SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 609

THE DAYTON POWER AND LIGHT COMPANY, APPELLANT,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

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[fol. 1] Certificate of transmittal omitted

[fol. 2]

IN SUPREME COURT OF OH

No. 23893

Title

THE DAYTON POWER AND LIGHT Co

vs.

THE PUBLIC UTILITIES COMMISSION

Action: Error to the Public Utilities Comm

Attorneys: E. P. Matthews, Charles P. P
Ohio; John E. Mullin, Kane, Pennsylvan
Gerkin, New York, N. Y., for plaintiff in e
Bricker, T. J. Herbert and his successor I
Columbus, Ohio; A. N. Browning, Washingt
Bernard S. Keyt, Piqua, Ohio; Paul Gingri
Paul T. Klapp, Tippecanoe City, Ohio; Mill
Sidney, Ohio; Tatum & Rush, Springfield,
fendant in error.

Memoranda of Pleadings, etc., Filed Writ

DOCKET ENTRIES

1932

December 21. Petition in error (printed)
mons and entry of appea

December 21. Motion by plaintiff in error f
order of Public Utilities C
affidavit filed.

December 23. 2 additional copies of petitio

December 23. Statement of interested part

December 28. Plaintiffs memorandum in s
tion and proof of service

1933

January 2. Transcript of Docket entrie
ings, entries and orders
and original papers filed

1933

January 2. One large folder containing exhibits filed.
January 2. One large folder containing copies of exhibits from Cols. Gas Co. filed.
January 2. Two volumes proceedings and testimony filed.
January 2. Ten large packages of exhibits filed.

[fol. 3]

January 2. Mimeograph copies of P. U. C. filed, opposing motion for stay.
January 4. Entry suspending execution of Order of Commission upon giving bond in sum of $50,000.00 to approval of Clerk of Supreme Court. Carl V. Weygandt, C. J. J. 33, p. 74.
January 11. Bond in sum of $50,000.00 approved and filed.
January 11. Motion by plaintiff in error for stay of final order of Public Utilities Commission sustained. J. 33, p. 79.
January 17. Application for extension of time to file plaintiff's printed brief herein.
January 17. Entry granting plaintiff in error leave to file printed brief on or before February 11, 1933. Carl V. Weygandt, C. J. J. 33, p. 82.
February 10. Printed Excerpts from Record filed. 2-11-33 proof of service filed.
February 10. Plaintiff's printed brief filed. 2-11-33 proof of service filed.
March 3. P. U. transcript & Ex. i to 16—Com. Ex. 1 & 2, Co. Ex. 196 & 198—T. J. Herbert. (Returned.)
March 13. Defendant's printed brief and affidavit of service filed. 3-17-33 proof of service filed.
March 15. Plaintiff's printed summary filed.
March 23. Plaintiff's reply brief filed by permission of Court.
June 21. Order affirmed. J. 33, p. 221.
July 5. Mandate issued.
July 5. Original papers sent to P. U. C. O.

1933

July 19. Application for rehearing filed.
September 20. Rehearing denied. J. 33, p. 250.
September 29. Petition for appeal to Supreme Court of United States filed.
September 29. Order allowing appeal filed.
September 29. Statement as to jurisdiction filed.
September 29. Assignment of errors filed.
September 29. Cost Bond signed by Dayton Power & Light Co. as principal & American Surety Co. as surety filed.
September 29. Supersedeas Bond signed by Dayton Power & Light Co. as principal & Columbia Gas & Elec. Corp. filed.

[fol. 4]

September 29. Order approving Bond, approved by Chief Justice filed.
September 29. Citation to appellee, The Public Utilities Commission and proof of service filed.
September 29. Notice and proof of service as required by paragraph 2 of Rule 12, filed.
November 2. Order of Chief Justice enlarging time for docketing case is U. S. Supreme Court until December 1, 1933 filed.
November 27. Amendment to assignment of Errors filed.
November 27. Precipe for Record by Appellant filed.
November 27. Precipe for Transcript by Appellee filed.
November 27. Stipulation as to Exhibits to be certified as originals filed.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 5] SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL—Filed Sept. 29, 1933

To the Honorable Chief Justice of the Supreme Court of Ohio:

Your petitioner, The Dayton Power and Light Company, Appellant herein, and Plaintiff in Error in cause No.

28393, entitled "The Dayton Power and Light Company vs. The Public Utilities Commission of Ohio" on the docket of the Supreme Court of Ohio, conceiving itself aggrieved by the decision of said court handed down June 21, 1933, and the final judgment entered September 20, 1933, for the reasons specified in the Assignment of Errors filed herewith, prays that an appeal be allowed therefrom to the Supreme Court of the United States; that appropriate citation be issued to the defendant, and that transcript of the record, proceedings, and papers upon which said decree was based, duly authenticated, be sent to the Supreme Court of the United States sitting at Washington, District of Columbia, as provided by law and the rules of said Court.

For which errors specified in said Assignment of Errors, the Appellant prays that said judgment of the Supreme Court of Ohio be reversed and a judgment rendered in favor of Appellant and for costs.

Your petitioner further prays that proper order relating to the security required of it be made, and that same operate as a supersedeas herein; and that upon giving such security all further proceedings of this court be suspended and stayed until the determination of said appeal by the Supreme Court.

Edwin P. Matthews, John E. Mullin, Chester J. Gerkin, Charles P. Pfarrer, Attorneys for Appellant.

Dated September 21, 1933.

[fol. 6] [File endorsement omitted.]

[fol. 7] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Sept. 29, 1933

Comes now The Dayton Power and Light Company, appellant in the above-entitled cause, and files the following Assignment of Errors upon which it will rely in the prosecution of the appeal herewith petitioned for from the final decree and judgment of the Supreme Court of Ohio entered on the 20th day of September, 1933.

1. The court erred in approving the findings and affirming order of appellee in fixing the value of appellant's property used and useful in furnishing gas service to the public, as follows:

In making no allowance for:

(a) Organization Costs

(b) Cost of Financing

(c) Cost of Cutting and Restoring Paving

(d) Going Concern Value

which items were shown to have a minimum value of $328,919; and in reducing the amount established by the evidence for:

(e) Working Capital by $21,320

(f) Undistributed Expenditures During Construction by not less than $31,595.

[fol. 8] 2. The court erred in affirming the finding and order of appellee in fixing the present value of appellant's property used and useful for the service and convenience of the public in the eight towns involved in this case in deducting from the reproduction cost new, less depreciation, of the physical properties other than land—which, under the statutes of Ohio (General Code, Section 499-9) constitutes the present value of said property in rate making proceedings—the item of organization costs, which costs, as shown by the uncontradicted evidence of several witnesses whose competency and credibility are not questioned either by the appellee or the court, would necessarily be incurred in the reproduction of the properties of appellant and would amount to at least $24,774; and in making no allowance whatever for said item, either in the reproduction cost new, or depreciated, or in the alleged present value of the property of the appellant on which it is allowed by the said order and judgment to earn a return as compensation for the use of its property; and thereby appellant's property is taken without due process of law, and it is denied the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

3. The court erred in affirming the finding and order of the appellee in fixing the present value of appellant's property used and useful for the service and convenience of the public, in deducting from the reproduction cost new, less depreciation, of the physical properties other than land—which, under the statutes of Ohio (General Code, Section 499-9) constitutes the present value of said property in rate making proceedings—the item of cost of financing, which cost, as shown by the uncontradicted evidence of several witnesses, whose competency and credibility are not questioned either by the appellee or the court, would necessarily be incurred in the reproduction of the said properties and would amount to at least $39,600, and in making no allowance whatever for said item, either in the reproduction cost new, or depreciated, or in the alleged present value of the property of the appellant on which it is allowed by the said order and judgment to earn a return as compensation for the use of its property; and thereby appellant's property is [fol. 9] taken without due process of law, and it is denied the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

4. The court erred in affirming the finding and order of appellee in fixing the present value of appellant's property used and useful for the service and convenience of the public, in deducting from the reproduction cost new, less depreciation, of the physical properties other than land—which, under the statutes of Ohio (General Code, Section 499-9) constitutes the present value of said property in rate making proceedings—the item of cost of cutting and restoring pavement existing on the date certain of the reproduction cost appraisal, amounting to $139,545, although the uncontradicted evidence shows that, in the reproduction of said properties on said date the cost of cutting, removing and restoring said pavement would be a necessary part thereof and the amount adopted by the said order of appellee and affirmed by the said judgment of the court as the value on the date certain and on which the appellant is allowed to earn a return as compensation for the use of its property is $139,545 less than the amount which the said statute of Ohio declares shall be taken as the present value thereof.

5. The court erred in affirming the finding and order of appellee in fixing the present value of appellant's property

used and useful for the service and convenience of the public, in deducting from the proved value thereof the item of going concern value, which, as shown by the uncontradicted evidence of witnesses whose competency and credibility are not questioned by either the appellee or the court, is an actual element of value inhering in said property and is not in any manner included in any other item of property in the appraisal, and amounts to at least $125,000, and in making no allowance whatever for said item of property, or property right or value on which it is allowed by the said order and judgment to earn a return as compensation for the use of its property; and thereby appellant's property is taken without due process of law and it is denied the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

[fol. 10] 6. The court erred in affirming the finding and order of the appellee in fixing the present value of appellant's property used and useful for the service and convenience of the public in allowing only $61,880 for working capital, although the uncontradicted evidence of witnesses whose competency and credibility are not questioned either by the appellee or the court, shows that the necessary amount of working capital would be at least $83,200, and in including in the value of the property of the appellant fixed by said order and judgment as the value on which it is allowed to earn a return as compensation for the use of its property the said sum of $61,880, which is $21,320 less than the lowest amount therefor shown by any evidence in the case; and thereby the appellant's property is taken without due process of law, and it is denied the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

7. The court erred in affirming the finding and order of the appellee in fixing the present value of appellant's property used and useful for the service and convenience of the public, in deducting from the reproduction cost new, less depreciation, of the physical properties other than land—which, under the statutes of Ohio (General Code, Section 499-9) constitutes the present value of said property in rate making proceedings—a part, to-wit, $31,595 of the amount of general overheads, or undistributed construction expenditures, included in said reproduction cost new, less

depreciation, of said properties, although the uncontradicted evidence of witnesses whose competency and credibility are not questioned either by the appellee or the court, shows that the said general overheads, or undistributed construction expenditures, necessarily incurred in the reproduction of said property on the date certain, would amount to at least $130,640, instead of the sum of $99,045, which the appellee adopted in lieu thereof, and in excluding from the value of the property of the appellant on which it is allowed by said order and judgment to earn a return as compensation for the use of its property for the service and convenience of the public, the said sum of $31,595; and thereby the appellant's property is taken without due process of law, and it is denied the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

[fol. 11] 8. The court erred in approving appellee's findings and affirming its order which reduced the annual allowance for appellant's operating expenses in the amount of $115,826, contrary to the undisputed evidence, as follows:

(a) Depreciation	$30,260
(b) Gas purchased for resale	71,547
(c) General Administrative Expenses	7,207
(d) Excise Tax	849
(e) Expenditures for managerial, engineering and other services	5,963

9. The court erred in affirming the finding and order of appellee in allowing appellant only 2 per cent for annual depreciation, whereas the uncontradicted testimony of witnesses, whose competency and credibility were not questioned, either by the appellee or the court, showed that the allowance should have been not less than 4 per cent of the present value of the depreciable property. The difference between the amount which appellee allowed for annual depreciation and the amount which should have been allowed is $30,260 a year; and thereby the appellant's property is taken without due process of law, and it is denied the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

10. The court erred in affirming the findings and order of appellee which disregarded contracts between the appel-

lant and The Ohio Fuel Gas Company, under which appellant purchases all the gas it supplies to consumers and pays therefor 45 cents per thousand cubic feet, and allows appellant to include in its operating expenses only 39 cents per thousand cubic feet for said gas, notwithstanding that the uncontradicted testimony of witnesses whose competency and credibility are not questioned either by the appellee or the court showed the contract price was the fair market price commonly paid for natural gas under similar circumstances and conditions; and thereby appellant's property is taken without due process of law, and it is denied the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States, and the order and judgment also violate Section 10 of Article 1 of said Constitution.

[fol. 12] 11. The court erred in approving the findings and in affirming the order of appellee in determining the reasonable price to be paid by appellant to The Ohio Fuel Gas Company for gas purchased by it and sold to its consumers, which findings and order failed to consider the full value of the property of said Ohio Fuel Gas Company used in supplying gas to appellant; and further failed to make and take into consideration an adequate allowance for the annual operating expenses necessary in supplying said gas; contrary to the Fourteenth Amendment to the Constitution of the United States and contrary to Section 10, Article 1 of said Constitution.

12. The court erred in affirming the finding and order of appellee, made in determining the reasonableness of the price which the appellant pays to The Ohio Fuel Gas Company for gas purchased under contracts, and in valuing the properties of The Ohio Fuel Gas Company in that connection, wherein the appellee valued the producing natural gas leaseholds, known throughout these proceedings as No. 1 leases, at $25 per acre, although the uncontradicted testimony of witnesses, whose competency and credibility were not questioned by either the appellee or the court, showed that the general market value of said leaseholds was greatly in excess of that figure; because it affects directly the price which the appellant is allowed by said order and judgment to include in its operating expenses for gas purchased from The Ohio Fuel Gas Company, and

thus the reasonableness of appellant's schedules of rates in controversy in this case, and results, through the order of refund and otherwise, directly and immediately in taking the property of the appellant without due process of law and denies to it the equal protection of the laws, contrary to the Fourteenth Amendment of the Constitution of the United States; and said order and judgment are also in violation of Section 10 of Article 1 of said Constitution.

13. The court erred in holding that, "the value of class No. 1 leases should be reduced to book value," which denies to The Ohio Fuel Gas Company a fair return upon the present value of its property actually used and useful in supplying gas to appellant, and through the consequent reduction in the price which the appellant is allowed to [fol. 13] include in its operating expenses for gas purchased, results, through the order of refund and otherwise, directly and immediately in taking appellant's property.

The court, having expressly held in the case of Columbus Gas & Fuel Company v. Public Utilities Commission of Ohio decided the same day and to which reference was made in its opinion in this case, that:

"6. The General Assembly of the State of Ohio, having provided a legislative formula for the Public Utilities Commission of Ohio in ascertaining the value of the property of a public utility for the purpose of fixing a rate base, such formula must be followed by the Public Utilities Commission, and a departure therefrom constitutes error.

"7. In ascertaining the value of a property of a public utility for the purpose of fixing a rate base, the Public Utilities Commission of Ohio has no vestige of discretionary power." (Syllabus.)

erred in holding that the leaseholds of The Ohio Fuel Gas Company, known as class No. 1 leases, could be valued only at the "book value" thereof, as there is no provision in the statutes of Ohio for valuing natural gas leaseholds, or other property, at "book value"; and as the valuation of the leaseholds of The Ohio Fuel Gas Company enters into the determination of the fairness of the contract price of gas paid by appellant, and thus affects its operating expenses and bears directly upon the reasonableness of its rates and upon the order of refund in this case, said holding

and judgment denies to the appellant the equal protection of the laws, and takes its property without due process of law; in violation of the Fourteenth Amendment to the Constitution of the United States; and the said order and judgment are also in violation of Section 10 of Article 1 of said Constitution.

14. The court erred in approving the finding and affirming the order of appellee fixing the accrued depreciation of the gas well construction and equipment of The Ohio Fuel Gas Company used in supplying gas to appellant at 58.1126 [fol. 14] per cent instead of 20 per cent as shown by the only competent and valid evidence introduced, which erroneous holding reduced the value of said company's property by $9,111,676. This method of depreciating said properties does not comply with the statutory provision (General Code, Section 499-9) which prescribes that the depreciation to be deducted from reproduction new.

"E. Depreciation, if any, from the new reproductive cost as of a date certain for existing mechanical deterioration, for age, for obsolescence, for lack of utility, or for any other cause, the percentage and amount of each class of depreciation, if any, to be specifically set forth in detail."

The method adopted by the appellee and affirmed by the court resulted in the fixing of a lower price for gas at the city gates than that provided in the contracts and paid by appellant and in reducing the allowance for this item of operating expense, and bears directly upon the reasonableness of the appellant's schedules of rates here in controversy and upon the order of refund in this case, and thereby appellant's property is taken without due process of law, and it is denied the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States; and the order and judgment also violate Section 10 of Article 1 of said Constitution.

15. The court erred in overruling the finding and order of the appellee in allowing $4,158,954 for the annual amortization of certain properties of The Ohio Fuel Gas Company, to-wit: No. 1 leaseholds, gas well construction and gas well equipment; and inasmuch as the operating expenses of the Ohio Fuel Gas Company entered into the determination by the appellee and court of the reasonableness

of the price paid by the appellant for gas and thus bears directly and immediately upon appellant's operating expenses and the reasonableness of its schedules of rates here in controversy, and the order of refund herein, said order and judgment denies to the appellant the equal protection of the laws and takes its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

[fol. 15] 16. The court erred in the case of The Columbus Gas & Fuel Company v. Public Utilities Commission of Ohio, which is referred to for the principles controlling the court's determination of this case, in holding that:

"8. The laws of Ohio make no provision for amortization, and the Public Utilities Commission of Ohio is without authority to take it into consideration in the ascertainment of values in fixing a rate base." (Syllabus.)

Said statutes as thus construed are in conflict with the Fourteenth Amendment to the Constitution of the United States. The question of the amortization or depletion of the properties of The Ohio Fuel Gas Company, particularly its gas producing leaseholds, enters immediately and directly into the reasonableness of the rate or price to be paid by appellant for gas, and thus affects its operating expenses and the reasonableness of the schedule of rates in question; and said order and judgment denies to appellant the equal protection of the laws and its property is taken without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

17. The court erred in holding that:

"No valuation can be based upon market price because of the fact that there is no market for a gas property so extensive as that of The Ohio Fuel Gas Company."

which holding is based upon no evidence, but is contrary to uncontradicted, competent and credible evidence; and, therefore, is arbitrary, unreasonable and unlawful; and through the reduction in the price which the appellant is allowed to include in its operating expenses for gas purchased from The Ohio Fuel Gas Company, results through the order of refund and otherwise, directly and immediately

in the taking of the property of the appella
process of law and denies to it the equal p
laws, in violation of the Fourteenth Amendn
stitution of the United States.

18. The court erred in approving the findi
ing the order of appellee in disallowing dela
cost of carrying reserve gas acreage held by
Gas Company and the United Fuel Gas Co
to enable said companies to comply with the
supply appellant and others with natural ga

[fol. 16] 19. The court erred in failing a
find that the price paid (45¢ per M. cu. ft.)
gas delivered at the gateways of the severa
pursuant to written contracts of several y
is the reasonable value and market price o

20. The court erred in approving and affi
ings and holding of appellee in disregardi
between appellant and The Ohio Fuel Gas C
which the former receives its gas supply for
its customers, and in substituting a lower an
provided in said contract for allowance in
erating expenses.

21. The court erred in approving the ap
that it was justified in disregarding the pr
contract between the United Fuel Gas Co
Ohio Fuel Gas Company for gas transport
commerce, and in adopting a lower price
scribed in the contract for said gas.

22. The court erred in affirming the fin
of the appellee fixing the rate of return to
pellant is entitled at 6.5 per cent per annum
that there is no finding by the appellee or
6.5 per cent was a fair and reasonable rat
the effective date of the appellant's sched
controversy in this case—to-wit, June 17, 1
other time, except the "present," i. e., No
the date of the appellee's final order; and
reason that it appears by the opinion of
the case of The Columbus Gas & Fuel Co
reason that it appears by the opinion of
its opinion accompanying its final order in

to which the appellee referred for the principles governing its determination of this case, that appellee adopted the rate of 6.5 per cent because, and only because, of the extraordinary business depression which existed at the time of its said finding and final order (November 3, 1932). In its said opinion in The Columbus Gas & Fuel Company case, appellee expressly stated that "in prosperous times, 7 or 8 per cent and even more, is allowed," a "gas company is a more hazardous undertaking than other utilties," "therefore, it might be justly said that such a company might be entitled to a greater rate because of the greater [fol. 17] risk involved." Said order and judgment deprives appellant of its property without due process of law and denies to it the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

23. The court erred in disapproving the schedule of rates filed by appellant on June 17, 1929, and in remitting it to the prior schedule in the face of the undisputed evidence that such lower rates are unreasonable, unjust, unfair, discriminatory and confiscatory, and insufficient to enable appellant to earn a fair return on the value of its property.

24. The court erred in affirming the order of appellee insofar as it required the appellant to refund to its consumers the difference between the rates collected for gas service under the schedules in controversy herein and the rates which would obtain under appellant's prior schedules with interest at the rate of 6 per cent per annum from the date of the payment to the date of such refund, etc., for the reason that said order and judgment are based on the unreasonable, unlawful and confiscatory valuation of appellant's property used and useful for the service and convenience of the public, and upon the unreasonable, unlawful and confiscatory allowance for operating expenses in connection with said service, and upon an unreasonable, unlawful and confiscatory rate of return allowed appellant—the said valuation, allowance for operating expenses and rate of return being arbitrary amounts adopted by the appellee, without any evidence to support them, and being contrary to the uncontradicted testimony of witnesses, whose competency and credibility are not questioned, either by the appellee or the court; and thereby appellant's property is taken without due process of law, and it is denied

the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

25. The court erred in failing and refusing to find from the unchallenged evidence that the schedule of rates in question did not and will not give appellant a full fair return and permit it to earn the reasonable compensation to which it is entitled for the use of its property in the public service; and, therefore, that said schedule of rates, filed June 17, 1929, was just and reasonable to the municipalities served.

[fol. 18] 26. The court erred in overruling appellant's petition for rehearing.

For which errors appellant prays that the said judgment may be reversed, and for such other and further relief as to this court may seem just and proper.

Edwin P. Matthews, John E. Mullin, Chester J. Gerkin, Charles P. Pfarrer, Attorneys for Appellant.

Dated September 21, 1933.

[fol. 19] [File endorsement omitted.]

[fol. 20] SUPREME COURT OF THE UNITED STATES

[Title omitted]

MOTION FOR LEAVE TO AMEND ASSIGNMENTS OF ERROR—Filed Nov. 27, 1933

Comes now the appellant, by its counsel, and moves the Court to amend its Assignment of Errors as follows:

By inserting between the eleventh and twelfth Assignment of Errors, as heretofore filed, a new assignment, to be numbered twelve, reading as follows:

12. The court erred in approving the findings and affirming the order of the appellee that of the leaseholds owned by The Ohio Fuel Gas Company only those known in this proceeding as class No. 1 were actually used and useful in rendering the service, and in failing and refusing to include in the value of said company's property any-

thing whatever for leaseholds of classes 2, 3 and 4, although the testimony of witnesses whose competency and credibility were not questioned showed that all of the leaseholds are actually used and useful in the public service; and that neither The Ohio Fuel Gas Company nor any similar company could be formed or financed without the leaseholds known in this case as classes 2, 3 and 4; and because the valuation fixed by the Commission on the said leaseholds affects directly the price which appellant is allowed by said order and judgment to include in its operating expenses for gas purchased from The Ohio Fuel Gas Company, and thus the reasonableness of appellant's schedule of rates in [fol. 21] controversy, said order and judgment result, through the order of refund and otherwise, directly and immediately in taking appellant's property without due process of law and deny to it the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States; and the said order and judgment are also in violation of Section 10 of Article 1 of said Constitution.

By inserting in said Assignment of Errors between the paragraph numbered twenty-four and twenty-five a new assignment reading as follows:

The Supreme Court of Ohio erred in failing and refusing to exercise its own independent judgment on questions of fact and of law presented in this case.

By amending paragraph twelve of the Assignment of Errors to read as follows:

12. The court erred in affirming the finding and order of appellee, made in determining the reasonableness of the price which the appellant pays to The Ohio Fuel Gas Company for gas purchased under contracts, and in valuing the properties of The Ohio Fuel Gas Company in that connection, wherein the appellee valued the producing natural gas leaseholds, known throughout these proceedings as No. 1 leases, at $25 per acre, although the uncontradicted testimony of witnesses, whose competency and credibility were not questioned by either the appellee or the court, showed that the general market value of said leaseholds was greatly in excess of that figure; because it affects directly the price which the appellant is allowed by said order and judgment

to include in its operating expenses for gas purchased from The Ohio Fuel Gas Company, and thus the reasonableness of appellant's schedules of rates in controversy in this case, the said order and judgment result, through the order of [fol. 22] refund and otherwise, directly and immediately in taking appellant's property without due process of law and deny to it the equal protection of the laws, contrary to the Fourteenth Amendment of the Constitution of the United States; and said order and judgment are also in violation of Section 10 of Article I of said Constitution.

By changing the numbers of the Assignment of Errors as follows: By designating as No. 13 the assignment of error numbered 12; by designating as No. 14 the first paragraph of the assignment heretofore numbered 13; by designating as No. 15 the second paragraph of the assignment heretofore numbered 13; and by numbering consecutively, after 15, the remaining assignment of errors.

Edwin P. Matthews, John E. Mullin, Chester J. Gerkin, Charles P. Pfarrer, Counsel for Appellant.

The appellee consents to the granting of the foregoing motion and the making of the amendments to the Assignment of Errors therein set forth.

—— ——, Counsel for Appellee.

November 25, 1933.

Approved:

Carl V. Weygandt, Chief Justice.

The appellee was served with a copy of the foregoing on the 25th day of Nov. 1933 but does not consent to the granting of said motion.

The Public Utilities Com. of Ohio, by Donald C. Powers, Its Atty.

[fol. 23] [File endorsement omitted.]

[fol. 24] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1933

THE DAYTON POWER AND LIGHT COMPANY, Appellant

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO, Appellee

ORDER ALLOWING APPEAL—Filed Sept. 29, 1933

The Appellant in the above entitled case, which is Number 23893 on the docket of the Supreme Court of Ohio, having prayed for the allowance of an appeal therein to the Supreme Court of the United States from the judgment made and entered therein by the Supreme Court of Ohio, as set forth in the Petition for Appeal and Prayer for Reversal therein, and from each and every part thereof and having presented and filed its Petition for Appeal, Assignment of Errors and Prayer for Reversal and Statement as to Jurisdiction on Appeal pursuant to the Statutes and the Rules of the Supreme Court of the United States in such case made and provided;

It is now hereby ordered that an Appeal be and the same is hereby allowed to the Supreme Court of the United States from the Supreme Court of the State of Ohio in the above entitled case as prayed for and as provided by law and the rules of the Supreme Court of the United States and it is further ordered that the Clerk of the Supreme Court of the State of Ohio shall prepare and certify a transcript of the material parts of the record and proceedings and the judgment in this cause in the Supreme Court of Ohio and transmit same to the Supreme Court of the United States so that he shall have it in said Court within 40 days from this date. Such material parts of said record and proceed-
[fol. 25] ing shall be designated by a præcipe of the parties hereto to be filed with the Clerk of the Supreme Court in Ohio.

And it is further ordered that security for costs on appeal be fixed in the sum of $1,000 and that the amount of the Supersedeas bond, to be conditioned and given according to law, is fixed in the sum of $400,000.00.

Dated Sept. 29, 1933.

Carl V. Weygandt, Chief Justice of the Supreme Court of the State of Ohio.

[fol. 26] [File endorsement omitted.]

[fols. 27 & 28] Cost Bond on appeal, approved Sept. 29, 1933, omitted in printing.

[fols. 29-33] Supersedeas bond on appeal for $400,000, approved Sept. 29, 1933, omitted in printing.

[fol. 34] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER APPROVING BONDS—Filed Sept. 29, 1933

Whereas an appeal has been allowed appellant to the Supreme Court of the United States from the Supreme Court of Ohio in the above entitled case, which is Number 23893 on its docket; and

Whereas the amount of the cost bond to be given by appellant has been fixed in the sum of one thousand dollars ($1,000.00); and of the Supersedeas Bond to be given by appellant has been fixed in the sum of four hundred thousand dollars ($400,000.00); and

Whereas appellant has presented its said bonds with satisfactory surety in said respective amounts.

Now said bonds and the surety thereon are approved and the execution and carrying out of the judgment of the Supreme Court of Ohio in said case is suspended pending said appeal and the disposition thereof.

Witness my hand at Columbus, Ohio this 29 day of Sept., 1933.

Carl V. Weygandt, Chief Justice of the Supreme Court of Ohio.

[fol. 35] [File endorsement omitted.]

[fols. 36 & 37] Citation in usual form showing service on Donald C. Power, filed Sept. 29, 1933, omitted in printing.

[fol. 38] [File endorsement omitted.]

[fol. 39] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ENLARGING TIME FOR DOCKETING THIS CASE—Filed Nov. 2, 1933

On the 29th day of September, 1933, on the petition of Appellant, The Dayton Power and Light Company was, by the undersigned as Chief Justice of the Supreme Court of Ohio, allowed an Appeal in the above entitled case from the Supreme Court of Ohio to the Supreme Court of The United States and on the same day I signed the citation therein to the Appellee returnable forty days from the above date.

It now being shown to me that the record in said case is voluminous and that the Clerk of the Supreme Court of Ohio cannot by said return day make and transmit to the Supreme Court of The United States a true copy of the material parts of said record, including the assignments of error and opinions delivered in the case, in accordance with rule 10 of the Rules of the Supreme Court of The United States; now upon application of the Appellant, and because of the above, which is good cause for this order, and in accordance with rule 11 of the Rules of the Supreme Court of The United States, I enlarge the time of and for docketing the above entitled case in the Supreme Court of the United States and with its clerk to the 1st day of December, 1933.

In witness whereof I have hereunto subscribed my name officially at the City of Columbus, Ohio this 2 day of Nov., 1933.

Carl V. Weygandt, Chief Justice of the Supreme Court of Ohio.

Agreed to:

Edwin P. Matthews, John E. Mullin, Chester J. Gerkin, Charles P. Pfarrer, Attorneys & Counsel for Appellant; John W. Bricker, Attorney general; Donald C. Power, Assistant Attorney General, Attorneys & Counsel for Appellee.

[fol. 40] [File endorsement omitted.]

[fol. 41] SUPREME COURT OF THE UNITED STATES

[Title omitted]

PRÆCIPE FOR RECORD—Filed Nov. 27, 1933

To the Clerk of the Supreme Court of Ohio:

You are requested to make a transcript of the record in case Number 23893 on the docket of the Supreme Court of Ohio to be filed in the Supreme Court of the United States, pursuant to an appeal allowed in the above entitled cause, and to include therein the following papers, testimony and exhibits:

1. Petition for Appeal.
2. Statement as to Jurisdiction.
3. Assignment of Errors.
4. Order of the Chief Justice of the Supreme Court of Ohio allowing appeal and fixing amount of cost bond and supersedeas bond.
5. Copy of cost bond.
6. Copy of supersedeas bond.
7. Entry made by the Chief Justice of the Supreme Court of Ohio approving said bonds.
8. Citation.
9. Acknowledgment of service of citation by the Attorney General, Attorney and Counsel for Appellee.

[fol. 42] 10. Acknowledgment of service by Attorney General, Attorney and Counsel for Appellee, of:

(1) Copy of Petition for Appeal.
(2) Order allowing appeal.
(3) Assignment of Errors.
(4) Statement as to Jurisdiction.
(5) Attention called to paragraph 3 of rule 12 of the Supreme Court of the United States.

11. Petition in Error to Supreme Court of Ohio.
12. Decision of the Supreme Court of Ohio in cases numbered 23864 and 23868 (consolidated) on the docket of that Court, being the Columbus case, entered June 21, 1933.
13. Decision of the Supreme Court of Ohio in case numbered 23893 on the docket of that Court, being the Dayton case, entered June 21, 1933.

14. Judgment entry in said case 23893 entered June 21, 1933.

15. Application for Rehearing of said case numbered 23893, filed July 19, 1933.

16. Entry denying Application for Rehearing entered September 20, 1933.

Also, the following in Advanced Utility Rate Proceeding numbered 341, before the Public Utilities Commission of Ohio (Dayton case), certified by that Commission to the Supreme Court of Ohio.

17. Schedules of natural gas rates in effect in the eight towns and places concerned in said A. U. R. P. No. 341 immediately prior to July 17, 1929, and the proposed rates filed June 17, 1929, to supersede said prior rates.

[fol. 43] 18. Order of Public Utilities Commission suspending said proposed rates for 120 days from June 17, 1929.

19. Election of Appellant, The Dayton Power and Light Company, to charge said proposed rates, and tendering its refunder bond in the sum of $65,000.

20. Order of said Commission of October 9, 1929, approving said bond and the amount thereof.

21. The order of said Commission of November 21, 1930, and the modification of same of January 9, 1931.

22. Stipulations dated October 25, 1932, that a transcript of the evidence in the Columbus case, No. 5935, on the docket of said Commission, relating to The Ohio Fuel Gas Company and the United Fuel Gas Company, and as to the reasonable wholesale price of gas, be made evidence in said A. U. R. P. No. 341.

23. Stipulations of October 31, 1932, as to same matter and to same effect.

24. Order of said Commission pursuant to said stipulations making said transcripts part of the record in said A. U. R. P. No. 341.

25. Order of said Commission making its findings in case No. 5935 (Columbus case) part of the record in said A. U. R. P. No. 341.

26. Findings and Decision of said Commission in case No. 5935 filed October 3, 1932.

27. Minority opinion filed in case No. 5935.

28. Findings and Decision of said Commission in A. U. R. P. No. 341 (Dayton case) filed November 3, 1932.

29. Order of said Commission of November 3, 1932, in said A. U. R. P. No. 341.

[fol. 44] 30. Application of Appellant, The Dayton Power and Light Company, of December 2, 1932, for Rehearing in said A. U. R. P. No. 341.

31. Protest of said Appellant of the valuation made by said Commission in A. U. R. P. No. 341 filed December 2, 1932.

32. Order of said Commission of December 2, 1932, overruling protest of valuation.

33. Motion of said Appellant to suspend order of November 3, 1932, until January 3, 1933.

34. Order of said Commission suspending its order of November 3, 1932, until January 3, 1933, entered December 2, 1932.

35. Order of said Commisison of December 20, 1932, denying application for rehearing.

36. Order of Supreme Court of Ohio filed January 4, 1933, suspending the Order of the Commission pending disposition of the proceeding in error.

37. The following portions of the transcript of testimony and exhibits:

A. On Valuation of Appellant's Property:

F. H. Lerch, Jr.:

Page 6, line 1 to and including line 16 on page 8.
Page 15, line 11 to and including line 28 on page 16.

Ohmer E. Howland:

Page 591, line 6 to and including line 9 on page 604.

[fol. 45] Company Exhibit No. 16

(1) Organization or Preconstruction Costs.

F. H. Lerch, Jr.:

Page 37, line 13 to and including line 27.
Page 65, line 21 to and including line 6 on page 66.
Page 249, line 23 to and including line 6 on page 251.

F. C. Hamilton:

Page 298, line 9 to and including line 6 on page 306.
Page 359, line 19 to and including line 6 on page 362.

James A. Emery:

Page 273, line 6 to and including line 27 on page 282.

(2) Cost of Financing.

F. H. Lerch, Jr.:

Page 46, to and including line 20 on page 51.
Page 231, line 7 to and including line 21 on page 235.
Page 239, line 6 to and including line 2 on page 241.

F. C. Hamilton:

Page 312, line 3 to and including line 26 on page 315.
Page 342, line 5 to and including line 12 on page 343.
Page 361, line 8 to and including line 6 on page 362.
Page 381, line 3 to and including line 16 on page 384.
Page 387, line 7 to and including line 19, same page.

Frank Parker:

Page 526, line 5 to and including line 2 on page 553.
Page 556, line 17 to and including line 24 on page 563.
Page 575, line 17 to and including line 26 on page 576.
Page 580, line 28 to and including line 2 on page 583.

[fol. 46] James A. Emery:

Page 282, line 28 to and including line 16 on page 294.
Page 395, line 1 to and including line 4 on page 396.

Company Exhibit No. 6

(3) Paving Over Mains.

F. H. Lerch, Jr.:

Page 64, line 7 to and including line 3 on page 65.
Page 90, line 6 to and including line 5 on page 93.
Page 210, line 1 to and including line 4 on page 212.
Page 216, line 9 to and including line 18 on page 224.
Page 586, line 13 to and including line 15 on page 590.

John F. Greene:

Page 447, line 6 to and including line 4 on page 458.

Company Exhibit No. 2, Pages 25 t

(4) Going Concern Value.

F. H. Lerch, Jr.:

Page 36, line 4 to and including line 11
Page 68, line 8 to and including line 18
Page 154, line 17 to and including line
Page 185, line 19 to and including line
Page 190, line 1 to and including line

F. C. Hamilton:

Page 311, line 16 to and including line
Page 315, line 27 to and including line
Page 343, line 13 to and including line
Page 350, line 18 to and including line
Page 365, line 1 to and including line 9
Page 385, line 23 to and including line
Page 388, line 15 to and including line

[fol. 47] James A. Emery:

Page 396, line 5 to and including line 3

Company Exhibit No. 7 to Be Certifie
Exhibit

(5) Working Capital.

F. H. Lerch, Jr.:

Page 51, line 21 to and including line 5
Page 251, line 7 to and including line 2

Company Exhibit No. 2, Page 11, Line 1
Line 17 Same Page

F. C. Hamilton:

Page 311, line 20 to and including line

(6) General Overheads.

F. H. Lerch, Jr.:

Page 36, line 12 to and including line
Page 47, line 17 to and including line
Page 48, line 17 and 18.
Page 49, line 19 to and including line 2

Company Exhibit No. 2, Page 8, Line 29 to and Including Line 10, Page 11

F. C. Hamilton:

Page 306, line 7 to and including line 19 on page 311.
Page 380, line 11 to and including line 2 on page 381.

Frank Parker:

Page 564, line 1 to and including line 27 on page 565.

[fol. 48] B. On Operating Expenses of Appellant:

(1) Gas Purchase Contracts.

Daniel S. Webber:

Page 934, line 6 to and including line 29 on page 968.

Ohmer E. Howland:

Page 721, line 18 to and including line 16 on page 724.
Page 762, line 7 to and including line 6 on page 786.
Page 791, line 1 to and including line 18 on page 795.
Page 814, line 8 to and including line 23 on page 815.
Page 835, line 13 to and including line 8 on page 848.
Page 852, line 3 to and including line 12 on page 859.
Page 866, line 20 to and including line 18 on page 868.
Page 869, line 16 to and including line 13 on page 875.

Company Exhibits Nos. 9, 10, and 13

(2) Annual Depreciation.

(3) Taxes.

Ohmer E. Howland:

Page 707, line 7 to and including line 11 on page 721.

Company Exhibit No. 8, Page 16

C. Rate of Return.

F. C. Hamilton:

Page 337, line 18 to and including line 3 on page 339.

Frank Parker:

Page 557, line 24 to and including line 27 on page 558.

[fol. 49] 38. Portions of the evidence in the Columbus case, No. 5935 before the Public Utilities Commission, and the Supreme Court of Ohio in Nos. 23864 and 23868, introduced in this case.

(1) Qualification of Witnesses

L. A. Seyffert:

Page 138.

B. L. Wheeler:

Page 1012 to and including line 11 on page 1014.

P. Antonelli:

Line 18 on page 1974 to and including line 17 on page 1977.

F. H. Lerch, Jr.:

Line 15 on page 2253 to and including line 12 on page 2257.

A. B. Dally, Jr.:

Line 14 on page 2983 to and including line 5 on page 2989.

George Wittmer, Jr.:

Page 3092 to and including line 18 on page 3096; line 26 on page 3096 to and including line 10 on page 3097.

Samuel W. Meals:

Line 14 on page 3175 to and including line 12 on page 3180.

Daniel S. Webber:

Page 3248 to and including line 19 on page 3249.

E. E. Roth:

Line 13 on page 3316 to and including line 6 on page 3317.

John E. Kelly:

Line 19 on page 5078 to and including line 10 on page 5079.

[fol. 50] Leon J. Pepperberg:

Page 5212.

Thomas R. Weymouth:

Page 5251 to and including line 8 on page 5252.

J. Paul Blundon:

Top of page 4324 to and including line 21 on page 4330; line 20 on page 4340 to and including line 1 on page 4341; line 26 on page 4404 to and including line 25 on page 4407; line 29 on page 4443 to and including line 12 on page 4444.

(2) Subject: Valuation and Operating Expenses

The Ohio Fuel Gas Company

Page 814 to and including line 13 on page 835.
Line 10 on page 854 to and including line 15 on page 857.
Line 16 on page 862 to and including line 11 on page 863.
Line 28 on page 866 to and including line 7 on page 867.
Line 10 on page 869 to and including line 19 on page 869.
Line 25 on page 869 to and including line 22 on page 870.
Page 871 to and including line 7 on page 872.
Page 873 to and including line 7 on page 877.
Line 20 on page 278 to and including line 15 on page 282.
Line 13 on page 285 to and including line 19 on page 289.
Line 25 on page 289 to and including line 6 on page 293.
Line 27 on page 4429 to and including line 2 on page 4432.

(3) Subject: Gas Leaseholds

The Ohio Fuel Gas Company

Necessity for Reserves, Value, Delay Rentals

Line 11 on page 1917 to and including line 12 on page 1923.

Line 6 on page 2093 to and including bottom of page 2099.

Line 9 on page 2118 to and including line 1 on page 2122.

Page 2124 to and including line 5 on page 2127.

Line 4 on page 5146 to and including line 6 on page 5146.

[fol. 51] Line 11 on page 5147 to and including line 4 on page 5151.

Line 13 on page 5152 to and including line 2 on page 5158.

Line 26 on page 5205 to and including line 4 on page 5209.

Line 27 on page 5210 to and including page 5211.

Line 10 on page 5304 to and including line 22 on page 5309.

Line 4 on page 5341 to and including line 22 on page 5344.

Line 8 on page 5346 to and including line 22 on page 5347.

Page 5553 to and including line 21 on page 5356.

Line 8 on page 5364 to and including page 5364.

Line 19 on page 5632 to and including line 14 on page 5634.

Line 6 on page 2989 to and including line 5 on page 3008.

Line 7 on page 3021 to and including line 25 on page 3049.

Line 21 on page 3053 to and including page 3091.

Line 11 on page 3097 to and including line 10 on page 3110.

Line 9 on page 3111 to and including line 20 on page 3112.

Line 6 on page 3116 to and including line 11 on page 3147.

Line 15 on page 3148 to and including line 21 on page 3174.

Line 28 on page 3179 to and including line 6 on page 3201.

Line 7 on page 3205 to and including line 20 on page 3215.

Line 6 on page 3216 to and including line 10 on page 3216.

Line 22 on page 3217 to and including page 3247.

Line 20 on page 3249 to and including line 22 on page 3256.

Line 28 on page 3259 to and including line 10 on page 3272.

Line 17 on page 3273 to and including line 14 on page 3288.

Line 6 on page 3289 to and including line 26 on page 3310.

Line 27 on page 3310 to and including line 6 on page 3311.

Line 8 on page 3314 to and including line 12 on page 3314.

Line 7 on page 3317 to and including line 7 on page 3350.

Line 6 on page 3351 to and including line 2 on page 3390.

Line 2 on page 5260 to and including line 13 on page 5274.

Line 25 on page 5295 to and including page 5299.
Line 3 on page 5406 to and including line 10 on page 5410.
Line 7 on page 5415 to and including line 10 on page 5418.
[fol. 52] Line 15 on page 5419 to and including line 5 on page 5425.
Line 8 on page 5426 to and including line 11 on page 5430.
Page 4559 to and including line 2 on page 4570.
Line 7 on page 4571 to and including line 2 on page 4587.
Line 19 on page 4505 to and including line 4 on page 4508.
Line 28 on page 4514 to and including line 17 on page 4515.
Line 18 on page 5243 to and including line 21 on page 5243.

(4) Subject: Amortization—Depletion

The Ohio Fuel Gas Company

Line 20 on page 998 to and including page 1002.
Line 9 on page 1004 to and including line 15 on page 1006.
Line 18 on page 2121 to and including line 27 on page 2121.
Line 5 on page 2331 to and including page 2331.
Line 23 on page 2589 to and including line 26 on page 2590.
Line 11 on page 2798 to and including line 27 on page 2798.
Line 24 on page 5195 to and including line 10 on page 5198.
Line 13 on page 5292 to and including line 24 on page 5295.
Line 11 on page 5418 to and including line 14 on page 5419.
Line 7 on page 5425 to and including line 7 on page 5426.

(5) Subject: Gas Well Depreciation

Line 7 on page 4344 to and including line 5 on page 4346.
Line 8 on page 4352 to and including page 4359.
Line 7 on page 4408 to and including line 11 on page 4426.
Line 19 on page 2271 to and including line 13 on page 2288.
Line 7 on page 5213 to and including line 5 on page 5250.
Line 4 on page 5365 to and including line 7 on page 5367.
Line 10 on page 5376 to and including line 4 on page 5391.
Line 6 on page 5431 to and including line 23 on page 5469.

Line 3 on page 5487 to and including line 17 on page 5491.
Line 17 on page 5252 to and including line 1 on page 5260.
Line 18 on page 5277 to and including line 12 on page 5292.
Line 13 on page 5393 to and including line 2 on page 5406.
Line 11 on page 5410 to and including line 7 on page 5413.
Line 11 on page 5418 to and including line 14 on page 5419.

[fol. 53] (6) Subject: Cost of Organization

The Ohio Fuel Gas Company

Line 4 on page 2345 to and including line 5 on page 2348.
Company Exhibit 45, line 16 on page 24 to and including line 23 on page 24.

(7) Subject: Cost of Financing

The Ohio Fuel Gas Company

Line 16 on page 2354 to and including line 24 on page 2358.
Company Exhibit 45, line 8 on page 25 to and including line 13 on page 25.

(8) Subject: Going Concern Value

The Ohio Fuel Gas Company

Line 6 on page 860 to and including line 10 on page 860.
Line 15 on page 2159 to and including line 10 on page 2171.
Line 19 on page 2173 to and including line 24 on page 2203.
Line 27 on page 2209 to and including page 2212.
Line 28 on page 2213 to and including line 25 on page 2217.
Line 24 on page 2219 to and including page 2234.
Line 12 on page 2291 to and including line 6 on page 2295.
Page 2312 to and including line 3 on page 2318.

(9) Subject: General Overheads

The Ohio Fuel Gas Company

Line 17 on page 2348 to and including line 5 on page 2354.
Line 5 on page 4342 to and including line 6 on page 4344.

Page 4647 to and including line 1 on page 4649.

Line 21 on page 4650 to and including line 23 on page 4652.

Line 17 on page 4653 to and including line 17 on page 4656.

Line 12 on page 4658 to and including line 24 on page 4659.

Company Exhibit 45, line 1 on page 23 to and including the word "labor" in line 8 on page 23.

[fol. 54] (10) Subject: Working Capital

The Ohio Fuel Gas Company

Line 13 on page 2010 to and including line 22 on page 2013.

Line 14 on page 2137 to and including line 28 on page 2138.

Line 9 on page 2336 to and including line 15 on page 2338.

Company Exhibit 45, line 6 on page 26 to and including line 12 on page 26.

(11) Subject: Incomplete Construction

The Ohio Fuel Gas Company

Line 28 on page 2333 to and including line 17 on page 2334.

Company Exhibit 45, line 13 on page 26 to and including line 16 on page 26.

(12) Subject: Annual Allowance for Depreciation

The Ohio Fuel Gas Company

Line 25 on page 4380 to and including line 3 on page 4381.

Line 14 on page 4492 to and including line 15 on page 4496.

Page 4503 to and including line 18 on page 4505.

(13) Subject: Valuation and Operating Expenses

The United Fuel Gas Company

Line 4 on page 1008 to and including line 19 on page 1008.

Line 16 on page 1011 to and including line 18 on page 1011.

Line 20 on page 1623 to and including line 23 on page 1624.
Line 8 on page 1626 to and including line 20 on page 1626.
Page 1636 to and including line 20 on page 1641.
Line 15 on page 1644 to and including line 20 on page 1646.
Page 1696 to and including line 23 on page 1698.
Line 13 on page 2237 to and including line 22 on page 2238.
Line 20 on page 4366 to and including line 20 on page 4383.
Line 12 on page 4517 to and including line 11 on page 4518.
Line 15 on page 4634 to and including line 14 on page 4643.

(14) Subject: Gas Leaseholds

The United Fuel Gas Company

Necessity for Reserves, Value, Delay Rentals

[fol. 55] Line 25 on page 1668 to and including line 6 on page 1669.
Line 9 on page 1694 to and including line 16 on page 1694.
Line 28 on page 1734 to and including page 1737.
Page 5078 to and including line 14 on page 5109.
Line 11 on page 5110 to and including page 5145.

The following pages from Company Exhibit No. 102:

Line 7 on page 754 to and including line 13 on page 799.
Line 11 on page 807 to and including line 7 on page 842.
Page 872 to and including page 909.
Page 949 to and including page 968.
Line 9 on page 1078 to the bottom of page 1116.
Page 1157 to and including page 1183.

(15) Subject: Amortization—Depletion

The United Fuel Gas Company

The following pages from Company Exhibit No. 105:

Line 16 on page 2691 to and including line 11 on page 2693.

(16) Subject: Going Concern Value

The United Fuel Gas Company

The following pages from Company Exhibit 101:

Line 12 on page 230 to and including line 16 on page 249.

The following pages from Company Exhibit 102:

Page 1207 to and including page 1230.

The following pages from Company Exhibit 105:

Line 11 on page 2662 to and including line 5 on page 2663.
Line 14 on page 2688 to and including line 9 on page 2690.

(17) Exhibits Offered and Admitted in Evidence

Company Exhibits Nos. 43, 44 (pp. 3, 9, 10, 11, 19, 20); 45 (pp. 29, 30); 58, 59, 60, 61, 62, 78, 80, 81-82-83, 116 (pp. 29, 30, 31); 140, 177, 178, 178-A, 179, 180.

City Exhibits Nos. 26, 27, 30, 46, 47, 50, 50-A, 102, 108 (pp. 5, 9, 10, 11, 12, 22, 23, 24); 110, 111.

[fol. 56] To be certified as original exhibits: 20 and 21, 57, 86, 139, 141, 142, 143, 144, 145, 146, 147, 148, 149, 153, 154, 155, 181, 182, 182-A, 183, 187, 189, 190, 191, 192, 206.

To be certified as original exhibit: 76.

Include in said record a copy of this præcipe and the acknowledgment of service thereof by the Attorney General of Ohio and the Assistant Attorney General, Attorneys and Counsel for Appellee.

Edwin P. Matthews, John E. Mullin, Chester J. Gerkin, Charles P. Pfarrer, Counsel for Appellant.

Dated November 27th, 1933.

Personal Service of the foregoing præcipe is acknowledged this 27th day of November, 1933, at Columbus, Ohio.

John W. Bricker, Attorney General of Ohio; Donald C. Power, Special Counsel and Assistant Attorney General, Counsel for Appellee.

[fol. 57] [File endorsement omitted.]

[fol. 58] SUPREME COURT OF THE UNITED STATES

[Title omitted]

PRÆCIPE FOR ADDITIONAL PORTIONS OF TRANSCRIPT—Filed Nov. 27, 1933

To the Clerk of the Supreme Court of Ohio:

In addition to the portions of the record requested by the appellant pursuant to an appeal allowed in the above entitled cause, the appellee desires the following incorporated into the transcript:

A. On Valuation of Appellant's Property.

Ohmer E. Howland:

Page 614, line 22 to and including line 5 on page 615.

B. Unit Costs (Direct Overheads).

F. H. Lerch, Jr.:

Page 25, line 23 to and including line 18 on page 32.
Company Exhibit 2, page 7, line 19 to and including line 28 on Page 8.
Company Exhibit 5, page 46.

Portions of the evidence in the Columbus Case No. 5935 before The Public Utilities Commission and the Supreme Court of Ohio in Nos. 23864 and 23868 introduced in this case:

1. Subject: Going Concern Value

The Ohio Fuel Gas Company

Lerch—Cross-examination:

Page 2306, line 16 to and including line 1 on page 2312.
Page 2339, line 25 to and including line 13 on page 2341.

2. Subject: Gas Well Depreciation

The Ohio Fuel Gas Company

Antonelli—Cross-examination:

Page 2004, line 2 to and including line 23 on page 2007.
Page 2016, line 9 to and including line 15 on page 2025.
Page 2135, line 1 to and including line 13 on page 2137.

[fol. 59] Lerch—Cross-examination:

Page 2322, line 17 to and including line 18 on pa
Page 2330, line 22 to and including line 8 on pa

Weymouth—Cross-examination.

Page 5292, line 13 to and including line 24 on pa

Pepperburg—Cross-examination:

Page 5495, line 4 to and including line 21 same

3. Subject: General Overheads.

The Ohio Fuel Gas Company

Company Exhibit 45, line 1 on page 23 to and i
line 5 on page 26.

4. Exhibits Offered and Admitted in Eviden

To be certified as original exhibit:
City Exhibit No. 74, pp. 9, 11, 12, 14, 16, 17, 18

John W. Bricker, Attorney General of Ohio;
C. Power, Special Counsel and Assistant
General, Counsel for Appellee.

Dated November 27, 1933.

Service of a copy of the foregoing præcipe is
acknowledged this 27th day of November, 1933.
Charles P. Pfarrer, Edwin P. Matthews,
Mullin, Chester J. Gerkin, Counsel for Ap

[fol. 60] [File endorsement omitted.]

[fol. 61] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER TO TRANSMIT ORIGINAL EXHIBITS—Filed Nov.

In the opinion of the undersigned, Chief Justice
Supreme Court of Ohio, the following original
should be inspected by the Supreme Court of the

States, and the Clerk of the Supreme
directed to transmit same to the Sup
United States along with the transcrip
præcipe filed with the Clerk of the Supr
viz: Company Exhibit No. 7.

The following exhibits in the Colum
before the Public Utilities Commissio
and 23868 before the Supreme Court
in this case:

City Exhibits: 74 (pages 9, 11, 12, 14

Company Exhibits: 20 and 21, 57, 86
[fol. 62] 144, 145, 146, 147, 148, 149,
182, 182-A, 183, 187, 189, 190, 191, 19

Said original exhibits shall be retur
the Supreme Court of Ohio upon the
the above entitled case by the Supreme
States.

Witness my hand at the City of C
25th day of November, 1933.

Carl V. Weygandt, Chief Justi
Court of Ohio.

Agreed to:

Edwin P. Matthews, John E.
Gerkin, Charles P. Pfarrer, A
for Appellant. John W. Bric
eral of Ohio; Donald C. Pow
& Assistant Attorney General,
sel for Appellee.

[fol. 63] [File endorsement omitted.]

[fol. 64] Certificate of Lodgment om

[fols. 65 & 66] Clerk's Certificate to t
printing.

[fol. 67] IN SUPREME COURT OF OHIO

No. 23893

THE DAYTON POWER AND LIGHT COMPANY, Plaintiff in Error,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO, Defendant in Error

PETITION IN ERROR

The Dayton Power and Light Company, the plaintiff in error, hereinafter designated as Dayton Company, now comes and for its Petition in Error says and informs Court as follows:

Dayton Company is a corporation organized and existing under the laws of Ohio, and is a public utility under said laws, to-wit, a natural gas company, and is engaged in the business of supplying natural gas for lighting, heating and power purposes to consumers within the State of Ohio, viz: in and to following municipalities and places (hereinafter designated collectively as "the Towns") all situated in said State, and to their inhabitants, to-wit: The City of Sidney, The City of Washington (known also as Washington Court House), The City of Troy, The Village of Tippecanoe City, The City of Piqua, Territory outside of and adjacent and contiguous to the corporate limits of Troy, The Village of North Hampton and territory contiguous and adjacent thereto, The Village of South Charleston and Wilberforce (unincorporated).

[fol. 68] Dayton Company owns and operates the gas distribution systems in and for the Towns consisting of pipes, mains, devices, appliances and property generally necessary to said business, except that it owns no gas wells and produces no gas, but purchases the gas supplied by it as aforesaid from The Ohio Fuel Gas Company, a corporation under the laws of Ohio, which delivers the gas to Dayton Company at the respective gateways of the Towns.

Immediately prior to July 17, 1929, Dayton Company, had on file with Defendant in Error, (hereinafter designated as the Commission) schedules (hereinafter designated as prior schedules) of rates and prices) to be charged

for natural gas supplied in and to the Towns and their inhabitants by it, which schedules were so on file for a long time before July 17, 1929, and said prior rates and prices were in force and effect immediately prior to that date.

On June 17, 1929, Dayton Company filed with the Commission, new schedules, effective July 17, 1929, of rates and prices (hereinafter designated as "new rates and prices") to be charged on and after that date for natural gas supplied by it as aforesaid in the Towns, which new schedules, new rates and price- were filed and became effective under Section 614-20 of the General Code as same appears in 110 Ohio Laws at page 366 (known as the Pence Law) and which was not superseded by the Section of the same number in 113 Ohio Laws at page 17 and not effective until after said new schedules, rates and prices were filed with the Commission, and said former section applied to and governed the proceedings had by the Commission to inquire into the justice and reasonableness of said new rates and prices.

[fol. 69] On the 9th day of July, 1929, the Commission suspended said new rates and prices for 120 days from June 17, 1929, being the date they were filed as aforesaid, and thereby instituted the proceeding before it entitled "In the matter of the proposed increased rates of The Dayton Power and Light Company for gas service filed to become effective July 17, 1929", the proceeding being "Advanced Utility Rate Proceeding No. 341", upon the docket and records of the Commission, and entered upon the hearing thereof.

Said hearing was not and could not be completed during said period of suspension, and on the 9th day of October, 1929, Dayton Company filed its bond with the Commission under said former Section 614-20, General Code, conditioned in accordance therewith, which bond was approved by the Commission and charged said new rates and prices for natural gas supplied by it in and to the Towns and their inhabitants from the end of said period of suspension during said inquiry and hearing and may do so under the order of the Commission in said proceeding No. 341 until January 3rd, 1933.

Said new rates and prices are higher than said prior rates and prices.

Hearings were had by and before the Commission in said proceeding No. 341 from time to time.

On November 21, 1930, the Commission made a finding that the Dayton Company had not sustained the burden imposed by law and proven to be fair and reasonable gateway rates it paid for natural gas distributed to consumers in the Towns, and ordered that the further consideration of the matter be postponed for ninety days wherein Day-[fol. 70] ton Company should produce all evidence available, touching the cost of producing, acquiring and transporting gas to the several gateways of the Towns and the fairness of the gateway rate of forty-five cents per thousand cubic feet, else said new schedules should be rejected from the files of the Commission and a further order requiring Dayton Company to refund the consumers of its natural gas in the Towns the difference with interest thereon, between said new rates, which were charged during the pendency of the proceeding No. 341 and the rates for such service in effect which were superseded by, said proposed or new schedules. On January 9, 1931, the Commission modified said order of November 21, 1930, by extending the time for the introduction of further evidence to justify said gateway rate for natural gas to a time to be fixed by the Commission.

Said gateway rate of forty-five cents per thousand cubic feet of gas delivered to Dayton Company at said several gateways was provided for in contracts between it and The Ohio Fuel Gas Company antedating said proceeding No. 341 and were in evidence.

On January 9, 1931, proceeding No. 5935 was pending before the Commission, same being an appeal from an ordinance of The City of Columbus, Ohio, fixing rates and prices for natural gas supplied therein by The Columbus Gas and Fuel Company, which is a distributing company only and purchased its supply of natural gas to be furnished its consumers in Columbus from The Ohio Fuel Gas Company at the gateway of that City, which Company purchased and obtained from United Fuel Gas Company, a large part of the gas supplied by it to The Columbus Gas and Fuel Com-[fol. 71] pany and to Dayton Company, which was produced in West Virginia and Kentucky and transported from those states to Ohio and thus moved in interstate commerce.

A vast amount of evidence was introduced in said proceeding No. 5935, in relation to the city gateway price in Ohio of gas supplied as aforesaid by The Ohio Fuel Gas Company, to which said Columbus Company objected. On October 3, 1932, the introduction of evidence in said proceeding No. 5935 having closed, the Commission made findings of the value of the property of The Ohio Fuel Gas Company and United Fuel Gas Company used and useful to supply natural gas at the gateways in Ohio and that thirty-nine cents per thousand cubic feet is the reasonable gateway price, to which said Columbus Company objected and excepted. Because the evidence on this point in said proceeding No. 341 would have been the same as that in said proceeding No. 5935, on October 25, 1932, by stipulation and order of the Commission, copies of this evidence was introduced and made part of the record in said proceeding No. 341, together with all objections and exceptions thereto as was also its said findings of fact and order of October 3, 1932 in said proceeding No. 5935, because the Commission adopted same so far as applicable in said proceeding No. 341.

The uncontradicted evidence in proceeding No. 341, showed that under the provisions of the General Code applicable to rate case the value of the property of Dayton Company used and useful for supplying natural gas service to the Towns and their inhabitants was $1,250,221, but the Commission adopted $868,387 as this value, as appears in a schedule attached to the finding of fact mentioned below. [fol. 72] In said proceeding No. 341 on November 3, 1932, the Commission made a finding of fact to which is attached a schedule finding Dayton Company's annual operating expenses were $622,333, instead of $726,531, as shown by uncontradicted evidence, in which schedule gas purchased by Dayton Company is figured by the Commission at 39 cents per thousand cubic feet instead of at 45 cents, and other reductions were made in addition to the reduction on account of gas purchased.

In said proceeding No. 341 on November 3, 1932, the Commission ordered that said new schedules of Dayton Company, to-wit, those filed June 17, 1929, be and are stricken from the files of the Commission and that Dayton Company cease charging and collecting the rates therein contained and that it is required within thirty days from the

date of the order to refund each and every consumer in the Towns the difference, with interest thereon at the rate of six per cent per annum from the date of payment of said charges to the date of refund, between the charges imposed and collected for service actually rendered under said new schedules under the authority of said bond, and the rates and charges which would have obtained for furnishing such service under said prior rates and prices which were sought to be superseded by said new schedules, and that any such money not claimed by the party entitled thereto in one year from the time it becomes due under the order, shall be paid by Dayton Company to the treasurer of the County or other political subdivision in which said new schedules were maintained, and that at the conclusion of such refunding Dayton Company report thereon and that the Commission retains jurisdiction for the purpose of such audits as may be necessary and proper in respect thereto.

[fol. 73] On December 2, 1932, upon motion of Dayton Company the Commission postponed the effective date of said order of November 3, 1932, to January 3, 1933.

On December 2, 1932, Dayton Company filed with the Commission in said proceeding No. 341, its written application for a rehearing of the matter upon which said order of November 3, 1932, was based and of matters determined in the proceeding and specified in said application, and also, filed as aforesaid its written protest of, to and against the valuations made by the Commission in said proceeding No. 341, including the values placed by it upon the property of Plaintiff in Error, The Ohio Fuel Gas Company and United Fuel Gas Company.

The Commission disallowed said application for rehearing and dismissed said protest of valuations.

Hereinafter reference to the evidence includes that introduced at the hearings before the Commission in said proceeding No. 341 and also copies of that introduced at hearings before the Commission and its findings of fact and order in said proceeding No. 5935 which by stipulation and order of the Commission were made part of the evidence and record in said proceeding No. 341.

The Commission erred in said proceeding No. 341 and in its orders and findings therein of November 21, 1930, and of November 3, 1932, and in that part of said proceeding No. 5935, which was as aforesaid made part of the record

in said proceeding No. 341, to the material prejudice of the substantial rights of Dayton Company, as hereinafter set [fol. 74] forth in respect to the matters and grounds contained in said application for rehearing and as follows:

1. In not granting but disallowing said application for rehearing.

2. In dismissing said protest of valuations.

3. Said orders and findings herein complained of, and each of them, are contrary to law, unjust and unreasonable, and are not supported by and are contrary to the evidence and against the weight thereof, and will deprive Dayton Company of its property without due process of law and deny it the equal protection of the law, and therefore repugnant to the Fourteenth Amendment to the Constitution of the United States, all to the great prejudice of its substantial right, and are erroneous.

4. The rates and charges for furnishing natural gas service by Dayton Company for public and private consumption in the Towns which it may charge and collect under said order of November 3, 1932, are confiscatory and will deprive Dayton Company of its property without due process of law and deny it the equal protection of the law, contrary to the Fourteenth Amendment to the Constitution of the United States, and are erroneous.

Dayton Company asserts that each and all the grounds which it sets out in said application for rehearing, which are adopted as if fully repeated here, both separately and collectively deprive it of its property without due process of law and deny it the equal protection of the law contrary to the provisions of the Constitution of the United States.

[fol. 75] 5. The rates to be charged under said order of November 3, 1932, are insufficient to yield Dayton Company reasonable compensation for the natural gas service rendered and to be rendered by it and are erroneous.

6. The rates to be charged under said order of November 3, 1932, do not give due regard to the value of Dayton Company's property actually used and useful for supplying natural gas service to the Towns and their inhabitants and for their convenience in that respect, and to the necessity of making reservations from income for depreciation,

surplus and contingencies and such other matters as may be proper, and are erroneous.

7. The Commission's findings and order of November 3, 1932, do not give due regard to the City gateway contracts existing between Dayton Company and The Ohio Fuel Gas Company whereunder Dayton Company receives its supply of natural gas and violate section ten of Article One of the Constitution of the United States by impairing the obligation of said contracts, and are erroneous.

8. The findings and order of the Commission in respect to the amount to be paid by Dayton Company to The Ohio Fuel Gas Company for natural gas at the city gateways is repugnant to the power given to Congress by Section Eight of Article One of the Constitution of the United States to regulate commerce among the several states, in that an attempt is thereby made to regulate the price for natural gas to be paid by The Ohio Fuel Gas Company to the United Fuel Gas Company for natural gas produced in the states of West Virginia and Kentucky and transported in interstate commerce from points in the State of West Virginia [fol. 76] to the several gateways of the Towns where it is delivered by The Ohio Fuel Gas Company to Dayton Company, and are erroneous.

9. The Commission erred in finding and holding the value of Dayton Company's property used and useful in furnishing natural gas service to the Towns and their inhabitants to be only $868,387 instead of $1,250,221 as established by the undisputed evidence.

Said reduction of valuation of Dayton Company's property consisted in erroneously eliminating the following items:

Organization expense	$24,774
Cost of financing	39,600
Going Concern value	125,000
Cost of cutting and restoring paving	139,545

and in erroneously reducing the following items:

Working Capital by	21,320
General overheads by	31,595
Total reduction	$381,834

10. The Commission erred in not taking judicial notice of and making proper allowance for the increased income tax Dayton Company must pay the United States under an act of Congress passed in June, 1932.

11. The Commission erred in using the rate 1.35 per centum as the rate to be allowed Dayton Company for excise taxes, whereas the excise tax rate in effect at the time of the finding and order of November 3, 1932, was, and will be for some time to come, 2.35 per centum.

[fol. 77] 12. The Commission erred in its computation of the public utility tax to be paid by Dayton Company on account of the Towns.

13. The Commission erred in allowing only two per centum for annual depreciation when, according to the only evidence submitted herein this allowance should have been not less than 4 per centum.

14. The Commission erred in not allowing depreciation on overheads applicable to those items of property which are depreciated in the valuation.

15. The Commission erred in fixing the price of natural gas at the gateways of the Towns at 39 cents per thousand cubic feet instead of at 45 cents, the price which Dayton Company is obligated to pay under its contracts with The Ohio Fuel Gas Company.

16. In its order and findings of November 3, 1932, the Commission erred in making reductions to the amount of $104,198, in Dayton Company's annual operating expenses as appears in and by the record in said proceeding No. 341.

17. The rate of return of 6.5 per centum allowed Dayton Company is insufficient and unreasonable, is contrary to the evidence and unsupported by any evidence, and is confiscatory and erroneous.

18. The evidence shows that under the identical rates to be charged under said order of November 3, 1932, Dayton Company sustained a loss in the year 1929, and under the increased rates now in effect its return has been less than 2 per cent on the proved value of its property.

[fol. 78] 19. The Commission erred in said order of November 3, 1932, in directing and requiring Dayton Com-

pany within 30 days from that date to refund to each and every consumer in the Towns, the difference, with interest thereon as set forth in the order, between the charges imposed and collected for service rendered under said new schedules and the rates and charges which would have obtained for the furnishing of such service, on the basis of Dayton Company's former schedules applicable to the Towns, and in providing that if any such money shall not have been claimed by the corporations or persons entitled thereto within one year from the time the same shall become due and payable according to said order, all such moneys shall be paid by Dayton Company to the Treasurer of the County or other political subdivision in which said proposed schedules were maintained under authority of said bond; and in ordering that at the conclusion of such refunding Dayton Company make detailed report thereon, and that jurisdiction of the Commission is retained for the purpose of such audits, as may be necessary and proper with respect thereto.

20. The Commission erred in refusing to consider evidence of the market value or going price for gas in the general vicinity of the Towns and comparable gateway prices fixed by contracts between unrelated companies; also in refusing to treat the gas purchase contracts between Dayton Company and The Ohio Fuel Gas Company as prima facie reasonable, and in holding that Dayton Company had not sustained the burden of proof to show that the price of 45 cents per thousand cubic feet paid for gas distributed by it is fair and reasonable. The Commission committed further error in ordering Dayton Company to produce evidence touching the cost to The Ohio Fuel Gas [fol. 79] Company of producing, acquiring and transporting natural gas to the several city gateways herein involved.

21. The holding and determination that 39 cents per thousand cubic feet is a fair and reasonable price to be paid by Dayton Company to The Ohio Fuel Gas Company for gas purchased by it at the respective Town gateways, is contrary to the uncontradicted, competent and credible testimony and erroneous. The evidence establishes that the contracts in question were made in good faith; that Dayton Company is a separate and distinct corporation

exercising all its functions and conducting its own business; that said contracts were approved by its board of directors, and that the contract price of 45 cents per thousand cubic feet is fair and reasonable and the best that could have been obtained from any source. Said holding is inconsistent with the specific finding of the Commission in its order of November 21, 1930 that the contracts are not "void or a sham or fraudulent," and was error.

22. Concurrently with the filing of its application for rehearing, Dayton Company filed a protest of the valuations found by the Commission in its said findings and order of November 3, 1932, and adopted and requested the Commission to consider as if specifically set out in said application and as separate grounds upon which Dayton Company considers said findings and order to be unreasonable and unlawful and as part of said application for rehearing, each and all of the separate grounds of said protest.

23. The Ohio Fuel Gas Company.

United Fuel Gas Company. In fixing and determining Dayton Company's annual operating expenses the Com- [fol. 80] mission erroneously determined the price which Dayton Company should pay to The Ohio Fuel Gas Company for gas purchased by it, delivered at the various Town gateways to be 39 cents per thousand cubic feet instead of 45 cents, the price specified in the contracts; and in arriving at said determination the Commission committed the following errors: to-wit, the acts, omissions and failures to act set forth in paragraphs (1) to (47) and subparagraphs hereinafter contained.

(1) The Commission disregarded said contracts between Dayton Company and The Ohio Fuel Gas Company for gas at the gateways of the Towns, notwithstanding the evidence—

(a) that The Ohio Fuel Gas Company charged other unrelated companies in Ohio higher prices at the City gate, which gateway prices have been allowed by the Commission in recent rate cases.

(b) that gate rates charged by other companies in Ohio were higher than the rates fixed in said contracts.

(c) that United Fuel Gas Company charged to the Hope Natural Gas Company, an unrelated company, a price

equal to that charged by United Fuel Gas Company to The Ohio Fuel Gas Company for similar quantities of gas.

(d) that the State and Federal Courts in West Virginia, as well as The Public Service Commission of West Virginia, have forbidden United Fuel Gas Company to discriminate in favor of a related company against an un- [fol. 81] related company. As shown by the evidence, the charge to the Hope Natural Gas Company amounts to an average of more than 26½ cents per thousand cubic feet.

(2) The Commission is and was without any authority to make any finding, decision or order in said proceeding No. 341 in respect to the value of the property of The Ohio Fuel Gas Company.

(3) The Commission is and was without any authority to make any finding, decision or order in said proceeding No. 341 in respect to the value of the property of United Fuel Gas Company.

(4) The Commission is and was without any authority to make any finding, decision or order in said proceeding No. 341 in respect to the operating expenses, rate of return or prices charged for natural gas by The Ohio Fuel Gas Company.

(5) The Commission is and was without any authority to make any finding, decision or order in said proceeding No. 341 in respect to the operating expenses, rate of return or price charged for natural gas by United Fuel Gas Company.

(6) The value found for the property of The Ohio Fuel Gas Company is contrary to the evidence in said proceeding No. 341.

(7) The value found for the property of United Fuel Gas Company is contrary to the evidence in said proceeding No. 341.

(8) If said valuation, finding and order should be held to be binding upon The Ohio Fuel Gas Company then said [fol. 82] valuation, finding and order will deprive that company of its property without due process of law, and deny to it the equal protection of the law, and would therefore be repugnant to the Fourteenth Amendment to the Constitution of the United States.

(9) If said valuation, finding and
to be binding upon United Fuel Gas
valuation, finding and order will dep
its property without due process of l
equal protection of the law, and woul
nant to the Fourteenth Amendment
the United States.

(10) The Commission failed to al
compensation to be paid The Ohio
proper and adequate annual charge
the several classes of its property ov
and expense of maintenance to keep t
of efficiency, corresponding to the p
industry and necessary for the pur
storing, replacing and/or substituti
erty in order to keep the plant in a st

(11) The Commission failed to all
Gas Company either depreciation o
rights of way.

(12) The Commission failed to m
ance to The Ohio Fuel Gas Compa
amortization on undistributed cons
(overheads), although in arriving a
said undistributed construction exp
sion made a deduction for observed

[fol. 83] (13) The Commission fai
of the compensation to be paid The
pany proper and adequate annual
tion of its property necessary to insu
holders of said company of their
property is exhausted and used up

(14) The Commission failed to al
Gas Company a reserve for amortiz
other than No. 1 leaseholds, gas wel
well equipment.

(15) The Commission allowed Th
pany only $4,158,954, for amortizat
competent evidence in said proceedi

the amount to be allowed should not have been less than $5,449,221. Furthermore, the finding of the Commission requires this amortization to be kept in a revolving fund. Obviously such revolving fund should have been based upon a valuation at least sufficient for the period for which the Commission requires Dayton Company to render service under said order of November 3, 1932.

(16) The Commission erroneously disregarded the agreement in evidence entered into October 31, 1927, by and between United Fuel Gas Company and The Ohio Fuel Gas Company, notwithstanding the evidence:

(a) that United Fuel Gas Company charged the Hope Natural Gas Company, an unrelated company, a price equal to the price charged by United Fuel Gas Company to The Ohio Fuel Gas Company for similar quantities of gas at similar points of delivery.

[fol. 84] (b) that the State and Federal Courts of West Virginia, as well as The Public Service Commission of West Virginia, have prohibited United Fuel Gas Company from discriminating in favor of a related company against an unrelated company.

(c) that the market or going price for natural gas was equal to or in excess of the price paid by The Ohio Fuel Gas Company under its said Contract with United Fuel Gas Company.

(d) that United Fuel Gas Company was not receiving a fair and adequate return.

The foregoing action of the Commission resulted in allowing in the expenses of The Ohio Fuel Gas Company only $3,413,162 for gas purchased from United Fuel Gas Company, when the amount should have been $4,172,362.

(17) The Commission refused to allow the sum of $1,684,913 or any other sum, for lease rentals by The Ohio Fuel Gas Company. The Commission also refused to allow any return on the value of the property on which lease rentals were and are paid. If The Ohio Fuel Gas Company must pay its lease rentals out of its return on property other than said leaseholds such return on the valuation of its property found by the Commission in said proceeding No. 5935 and adopted in said proceeding No. 341

will be reduced to an annual rate of 4.2395 per centum without taking into consideration the proper allowance for excise tax and will deprive said company of its property without due process of law and deny to said company the equal protection of the law, contrary to the Fourteenth Amendment to the Constitution of the United States.

[fol. 85] (18) The Commission erred in limiting the leasehold valuation of The Ohio Fuel Gas Company to No. 1 acreage and in failing to take into consideration the resulting increased cost of production and transmission, as shown by the uncontradicted evidence. The undisputed evidence shows that it would be neither economical nor practical to attempt to operate The Ohio Fuel Gas Company with No. 1 leaseholds only.

As shown by the uncontradicted testimony of practical natural gas men, such practice would result in increasing cost of production. More wells would have to be drilled on No. 1 acreage to get the necessary volume of gas, with the result that the rock pressure of all the wells would decrease, thus requiring additional pumping and compressor equipment. Offset wells would have to be drilled to protect No. 1 acreage from drainage, if the company did not control Classes 2, 3 and 4, and it would be necessary to reduce the line pressure in order to get the gas out of the ground and then to bring the gas from the low pressure necessary to take it out of the ground to the high pressure necessary for its transmission to the markets.

The cost of natural gas thus obtained would amount to a prohibitive figure, much greater than the price allowed in said proceeding No. 341 to Dayton Company to be paid to The Ohio Fuel Gas Company at the gateways of the Towns.

(19) The Commission found that The Ohio Fuel Gas Company has an unlimited supply of gas and gave this as a reason for not allowing amortization of plant, other than Account 211—Gas Well Construction, Account 212—Gas Well Equipment and No. 1—Leaseholds. Notwith-[fol. 86] standing this, the Commission refused to allow either a return on the investment or the carrying charges for the reserve acreage which the Commission found contains the unlimited supply of gas which makes such additional amortization unnecessary, upon which the Commis-

sion justified its assumption for the purposes of depreciation of an average remaining life for such unamortized property of not less than sixty-six and two-thirds (66 2/3) years, and upon which the Commission further justified a rate of return of 6.5 per centum on the present value of the property devoted to an admittedly hazardous undertaking.

(20) The Commission erroneously failed to take into consideration the cost and amount of acreage which it was necessary to prospect, take up and test to develop the company's present No. 1 acreage.

(21) The Commission found that the No. 1 acreage of The Ohio Fuel Gas Company, on which it allowed a valuation, is sufficient only for three years and two months, which is an unreasonably short time for said company and Dayton Company to have an adequate and reliable supply of natural gas to enable the latter to supply proper natural gas service in and to the Towns.

(22) In arriving at the percent of General Administrative and other General Expense applicable to the production and transmission systems, the Commission erroneously omitted consideration of the amount paid by The Ohio Fuel Gas Company for lease rentals.

(23) The Commission erroneously allowed The Ohio Fuel Gas Company only $391,979 for General Administrative Expense—Accounts 427 to 437, when the only compe-
[fol. 87] tent evidence in said proceeding No. 341 showed that such annual expenditure was $583,799.

(24) The Commission erroneously allowed The Ohio Fuel Gas Company only $199,347 for Other General Expense—Accounts 442 to 473, when the only competent evidence in said proceeding No. 341 showed that such annual expenditures was $272,835.

(25) In arriving — the rate of return, labor prices and labor performances, the Commission recognized trends and present day conditions, but, erroneously allowed only 1.35 per centum for excise tax, whereas the law in effect at the time of said finding and order required The Ohio Fuel Gas Company to pay 2.35 per centum on the gross receipts.

(26) The Commission erroneously allowed only 12 per centum for Federal income tax, whereas the allowance

should have been 13¾ per centum for both The Ohio Fuel Gas Company and United Fuel Gas Company, without any deduction for bond or other interest not allowed or considered by the Commission as operating expenses.

(27) The Commission erroneously allowed only 6.5 per centum return on the respective rate bases found for The Ohio Fuel Gas Company and United Fuel Gas Company, whereas such return for each of said companies should not have been less than 8 per centum.

(28) The Commission erroneously did not give due regard to the necessity of making reservations from income for surplus and contingencies of either Dayton Company, The Ohio Fuel Gas Company or United Fuel Gas Company.

[fol. 88] (29) While the Commission deducted from the operating expenses of Dayton Company and The Ohio Fuel Gas Company discounts obtained on account of cash payments by said companies, it erroneously did not allow adequate working capital with which to take advantage of such discounts in the future.

(30) While the Commission found and hold that it would follow the allowance of expenses and return on investment made by The Public Service Commission of West Virginia in respect to United Fuel Gas Company, yet this Commission erroneously reduced the following allowances of the West Virginia Commission:

(a) Depreciation allowance on general property from 5 per cent to 1.12 per cent.

(b) Return on the rate base from 8 per cent (or under the temporary rate of 7.35 per cent).

(31) The Commission erred in finding, holding and/or ordering that the value of all of the property of The Ohio Fuel Gas Company, exclusive of distribution plant, as of December 31, 1929, was the sum of $74,538,280, as fully set forth in Exhibit B appended to its order filed in proceeding No. 5935, and adopted by it in said proceeding No. 341.

(32) The Commission erred in finding, holding and/or ordering that the value of all the property of United Fuel Gas Company, exclusive of distribution plant, as of December 31, 1929, was the sum of $37,422,112 as set out in

Exhibit A appended to its order entered in proceeding No. 5935, and adopted by it in said proceeding No. 341.

[fol. 89] (33) The Commission erred in finding, holding and/or ordering that for the same fiscal period, the reasonable operating expenses of The Ohio Fuel Gas Company were as set forth in Exhibits B, Sheet 1 and A, Sheet 1, attached to its finding of facts filed in proceeding No. 5935, and adopted by it in said proceeding No. 341.

(34) The Commission erred in finding, holding and/or ordering, in Proceeding No. 5935 before it, that the reasonable and just price to be paid for natural gas by The Ohio Fuel Gas Company to producing companies at the Ohio River is the sum of 22 cents per thousand cubic feet, which finding the Commission adopted and acted upon in said proceeding No. 341.

(35) The Commission erred in excluding from its consideration the evidence which sought to establish the fairness of the City gate price by proof that the same was the lowest that could be obtained by Dayton Company from the supplying company or from any other available source of supply.

(36) The Commission erred in holding that the evidence of the value of productive acreage (i. e. Class No. 1) "could not be based upon the price between a willing buyer and a willing seller. In the very nature of the operation, companies have a monoply within their own field and further, the value of the land in the market would depend upon the price which the regulated company may be permitted to charge to its customers," in the face of the undisputed evidence showing that the gas lands of The Ohio Fuel Gas Company are contiguous to the gas lands of other and unrelated natural gas producers and are interspersed with gas lands belonging to other and unrelated natural gas [fol. 90] producers, and in the face of the undisputed evidence of competent and creditable witnesses that a general market does exist for gas lands and leaseholds in the vicinity of those of The Ohio Fuel Gas Company, that such leaseholds are bought and sold in the open market, between willing buyers and willing sellers and that a general market value for such leaseholds does exist.

(37) The Commission erred in admitting, receiving and/or relying upon the evidence, or any part thereof, of the witness Harry Allensworth, for the reason that he did not possess the necessary training, education and/or experience which gave him any peculiar knowledge in respect to the subjects and matters to which he testified.

(38) The Commission erred in over-ruling the objections to the testimony and exhibits introduced by and through the witness Harry R. Allensworth.

(39) The Commission erred in admitting, receiving and/or relying upon the evidence, or any part thereof, of the witness J. Paul Blundon for the reason that he did not possess the necessary training, education and/or experience which gave him any peculiar knowledge in respect to the subjects and matters to which he testified.

(40) The Commission erred in overruling the objections to the testimony and exhibits introduced by and through the witness J. Paul Blundon, and especially to that testimony and those exhibits of said Blundon which were predicated upon the testimony and exhibits of the witness Harry R. Allensworth.

[fol. 91] (41) The Commission erred in refusing to consider competent and relevant evidence tending to show that there is a market for gas leaseholds and tending to show the value of such leaseholds in such market.

(42) The Commission erred in refusing to admit and consider Company Exhibit No. 140, which was a written offer from Benedum-Trees Oil Company of Thirty Million Dollars cash for the leaseholds of The Ohio Fuel Gas Company.

(43) The Commission erred in fixing and determining the value of the natural gas leaseholds of Class No. 1 of The Ohio Fuel Gas Company in that it did not base its alleged valuation thereof upon any evidence in said proceeding No. 341, but upon the amount which had been determined as the value of certain natural gas leaseholds in another case, to-wit, the Logan Gas Company case, referred to by the Commission in its finding and opinion.

(44) The Commission made its determination of the amount which Dayton Company shall be allowed to charge in its operating expenses for gas purchased by it from The Ohio Fuel Gas Company, to-wit, 39 cents per thousand cubic

feet on the identical basis that it would determine a rate to be charged by said The Ohio Fuel Gas Company for such gas if The Ohio Fuel Gas Company in selling and delivering such gas were a public utility, although it is definitely settled under the law of this state that The Ohio Fuel Gas Company in selling and delivering gas to a distributing company at wholesale is not a public utility; and in so doing, the Commission substituted its judgment for that of The Ohio Fuel Gas Company, its officers and di- [fol. 92] rectors, as to the amount of natural gas leaseholds which it may carry as a protection of its property used in this non-utility business, and this without any allegation or evidence of fraud or bad faith or abuse of discretion by, or on behalf of, The Ohio Fuel Gas Company, and in determining the cost to The Ohio Fuel Gas Company of the gas it sells and delivers to Dayton Company, it erroneously excluded from the operating expenses of The Ohio Fuel Gas Company the rentals, taxes and other carrying charges of said natural gas leaseholds, Classes 2, 3 and 4, and thus erred.

(45) United Fuel Gas Company i a corporation under the laws of West Virginia, having its principal place of business and conducting its business and activities in that state, so far as they relate to said proceeding No. 341. Dayton Company avers that a price charged by United Fuel Gas Company to The Ohio Fuel Gas Company for gas which is fair and reasonable, or determined by methods which are recognized as fair and reasonable under the laws of West Virginia cannot lawfully be held to be unfair or unreasonable, because of the common ownership of the stock of the said United Fuel Gas Company and The Ohio Fuel Gas Company in the absence of a finding or evidence of fraud or bad faith; nevertheless, the Commission in determining what is fair to be paid United Fuel Gas Company by The Ohio Fuel Gas Company for gas eliminated from the factor determining such price elements which are recognized by the laws of West Virginia as just and proper, to-wit, the taxes, rentals and other carrying charges of unoperated natural gas leaseholds, that is, leaseholds of Classes 2, 3 and 4, and thus erred.

(46) The allocation percentages used by the Commission [fol. 93] for the purposes of apportioning or allocating the

expenses of United Fuel Gas Company to the business of The Ohio Fuel Gas Company are arbitrary and/or inconsistent with the findings of the Commission, and erroneous.

(47) The rate of return under the order of the Commission herein in said proceeding No. 341 of November 3, 1932, neither assures nor permits confidence in the financial soundness of the Dayton Company or of The Ohio Fuel Gas Company or of United Fuel Gas Company, and is inadequate, under efficient and economical management, to maintain and support Dayton Company's credit and/or the credit of said other companies, and to enable Dayton Company or said other companies to raise the money necessary for the proper discharge of their duties, and constituted error.

24. There are other errors apparent on the face of the record prejudicial to the rights of Dayton Company.

Wherefore, Plaintiff in Error (Dayton Company) prays that the Defendant in Error (the Commission) be required forthwith to transmit to the Clerk of this Court a transcript of the Journal Entries, original papers, or transcripts thereof, and a certified transcript of all the evidence adduced upon the hearing before the Commission in the proceeding complained of, to-wit, in said proceeding No. 341; that the same be filed in this Court and that said proceedings, findings and orders of the Commission may be reversed and vacated or modified, and that this Plaintiff in [fol. 94] Error (Dayton Company) be restored to all things it has lost by reason thereof.

E. P. Matthews, John E. Mullin, Chester J. Gerkin, Charles P. Pfarrer, Attorneys for Plaintiff in Error, The Dayton Power and Light Company.

[fol. 95] Waiver

The Public Utilities Commission of Ohio hereby waives the issuance and service of summons in error and enters its appearance in the above entitled cause.

Signed at Columbus, Ohio, this — day of December, 1932.

The Public Utilities Commission of Ohio, by —— ——, Chairman. —— ——, —— ——, Commissioners.

[fol. 96] IN SUPREME COURT OF OHIO

THE COLUMBUS GAS & FUEL CO.

v.

PUBLIC UTILITIES COMMISSION OF OHIO

CITY OF COLUMBUS

v.

PUBLIC UTILITIES COMMISSION OF OHIO

(Two cases)

Public Utilities Commission—Valuation for Rate-making purposes—Ohio Law Governs, Although Gas produced and delivered in another state—Determination of rate-base—Expenses, valuation and working capital apportioned on proportionate sales basis, when—Transmission system valuation and expenses apportioned on demand mileage basis, when—Distribution cost apportioned on basis of actual plant valuation and expenses, when—Valuation of gas producing leaseholds—Section 499-9, General Code—Book value, and not valuation in another controversy, controls—Error to depart from legislative formula in ascertaining value—Public Utilities Commission without discretion in ascertainng value, when—Amortization not to be considered in fixing rate, when

1. In the valuation of a public utility by the Public Utilities Commission, the fact that certain service of the utility consists in the delivery and sale of gas produced in another state does not justify the application of the law of such other state to the facts found. Pertinent facts with reference to the value of the property of a public utility used and useful in the service of a community in this state are governed by Ohio law.

2. In determining the rate-base for a natural gas company, production expenses and valuation, general property valuation, general expenses, and working capital should be apportioned, between different localities served, on proportionate sales basis.

3. In determining the rate-base for a natural gas company, transmission system, valuation, and expenses should

be apportioned, between localities served, on the demand mileage basis.

4. In determining the rate-base for a natural gas company, distribution cost should be apportioned, between localities served, on the basis of actual valuation of distributing plants and expenses incurred in the several localities.

5. In the valuation of gas producing leaseholds, under Section 499-9, General Code, the Public Utilities Commission should value the leaseholds covered by the record and not employ a valuation previously made covering only part of such leaseholds in a separate and totally different controversy. In valuing such leaseholds used and useful, the [fol. 97] commission may consider book value (Logan Gas Co. v. Public Utilities Commission, 124 Ohio St., 248, approved and followed.)

6. The General Assembly of the state of Ohio having provided a legislative formula for the Public Utilities Commission of Ohio, in ascertaining the value of the property of a public utility for the purpose of fixing a rate-base, such formula must be followed by the Public Utilities Commission, and a departure therefrom constitutes error.

7. In ascertaining the value of the property of a public utility for the purpose of fixing a rate-base, the Public Utilities Commission of Ohio has no vestige of discretionary power.

8. The laws of Ohio make no provision for amortization, and the Public Utilities Commission of Ohio is without authority to take it into consideration in the ascertainment of values in fixing a rate.

(Nos. 23864, 23867 and 23868—Decided June 21, 1933)

Error to the Public Utilities Commission

These cases arise as proceedings in error to an order of the Public Utilities Commission, entered upon a complaint and appeal filed by the Columbus Gas & Fuel Company, protesting certain rates scheduled in an ordinance fixing the price to be charged for natural gas in the city of Columbus. This ordinance was submitted to a referendum vote at an election duly held, and approved by a ma-

jority of the qualified electors voting thereon. By its terms it provided for a rate of 48 cents per M c. f. with a minimum monthly charge of 75 cents, and was to become effective *from and after November 12, 1929.*

The petition in error filed in this court by the Columbus Gas & Fuel Company in case No. 23864 reads in part as follows:

"Plaintiff in error says that it is a corporation organized under the laws of Ohio and engaged as a public utility in distributng natural gas for light, heat and power purposes to consumers in the city of Columbus, Franklin county, Ohio, and contiguous territory. That it is the owner of and [fol. 98] operating and doing business under a certain franchise granted by the city of Columbus to its predecessor in title, its successors and assigns, by Ordinance No. 4539, passed by the city council of the city of Columbus, Ohio, February 4, 1889.

"That on November 5, 1929, the city of Columbus passed an ordinance entitled 'An Ordinance, No. 645-29, to regulate the price that may be charged for natural gas in the city of Columbus during the period of five years from the twelfth day of November, 1929, and providing for the submission of this ordinance to a referendum vote at an election to be held November 5, 1929.'

"That said Ordinance No. 645-29 was submitted to a vote of the qualified electors of the city of Columbus and was approved by a majority of those voting thereon at the election held on November 5, 1929, and said ordinance by its terms became effective from and after November 12, 1929.

"That said Ordinance No. 645-29 was not accepted by plaintiff in error.

"Plaintiff in error further says that on the thirty-first day of December, 1929, it presented to and filed with the defendant in error, The Public Utilities Commission of Ohio, its complaint in writing that the rate and price so fixed to be charged for natural gas in the city of Columbus during the period of five years from said twelfth day of November, 1929, was and would be unlawful, unjust, unreasonable and insufficient to yield a reasonable compensation for the service, having due regard to the value thereof and of all the property of plaintiff in error actually used and useful for the convenience of the public in furnishing said service and to the necessity of making reservations from its

income for surplus, depreciation, contingencies and such other matters as may be proper, including the purchasing of a supply of natural gas in order to furnish said service, [fol. 99] and praying that after hearing and investigation the commission determine the rate and price so fixed by said Ordinance No. 645-29 to be unlawful, unjust and unreasonable and insufficient to yield reasonable compensation for the service, and determine and fix the just and reasonable rate and price to be charged, demanded, exacted and collected therefor as required by law, and order the same submitted for the rate, charge and price fixed by said ordinance."

The majority of the commission entered an order setting aside the rates embodied in the ordinance and fixing the price to be charged for natural gas in the city of Columbus during the period in question at 55 cents per M c. f.

The commission found as follows with reference to the ordinance rate and with reference to the rate fixed in its order:

"That the rate per thousand cubic feet of 48¢, with an additional charge of 5¢ per thousand cubic feet, if the monthly bills are not paid within a fixed time, with a minimum charge of 75¢ per month without discount, fixed and prescribed by said Ordinance, are unreasonable and unjust and ought not to be ratified and confirmed, and that just and reasonable rates and charges should be substituted therefor;

"That the rate per thousand cubic feet of 55¢, with an additional charge of 5¢ per thousand cubic feet, if monthly bills are not paid within a fixed time, and a monthly minimum charge of 75¢, without discount, are just and reasonable rates and charges for the service furnished and supplied by said appellant in the City of Columbus, Ohio, and

"That the gross and net revenues derived by said The Columbus Gas and Fuel Company for furnishing natural gas for public and private consumption, in the City of Columbus, at the rates and charges hereinbefore found by the Commission to be just and reasonable will be sufficient [fol. 100] to yield said The Columbus Gas and Fuel Company a reasonable compensation for such service."

One member of the commission dissented from the holding of the majority of the commission, finding the rates

charged in the ordinance in question to be reasonable, just and lawful, and sufficient to yield a reasonable compensation for the service under the statute.

Further facts are stated in the opinion.

Mr. John L. Davies, city attorney, Mr. James M. Butler and Mr. James W. Huffman, for the city of Columbus.

Mr. Gilbert Bettman and Mr. John W. Bricker, attorneys general, and Mr. T. J. Herbert, for the Public Utilities Commission of Ohio.

Mr. Edward C. Turner, Mr. A. M. Calland, Mr. L. K. Langdon and Mr. Chester J. Gerkin, for The Columbus Gas & Fuel Company.

OPINION

By the COURT:

The outstanding fact which must first be stated as underlying and conditioning every element involved in this controversy is as stated in the 1931 annual report of the Columbus Gas & Electric Corporation, that all of the properties involved in this case are "thoroughly integrated and interconnected, they constitute a single operating unit."

With the exception of the qualifying shares, the Columbia Gas & Electric Corporation, which is the parent corporation of this group, holds the entire common stock of the United Fuel Gas Company. This company, a resident of West Virginia, produces gas outside of the state and sells it at the Ohio river at wholesale rates to the Ohio Fuel Gas Company. The Ohio Fuel Gas Company in turn mingles this gas bought from the United Fuel Gas Company with gas produced by the Ohio Fuel Gas Company and with other gas produced by independent producers in the state, [fol. 101] and then transmits this gas to various points both within and without the state of Ohio, selling certain gas directly to consumers, and selling certain gas to distributing companies, as in this case. With the excepton of the qualifying shares, all of the common stock of the Ohio Fuel Gas Company is owned by the Columbia Gas & Electric Corporation.

The Columbus Gas & Fuel Company, one of the distributing companies supplied by the Ohio Fuel Gas Company, is likewise owned by the Columbia Gas & Electric Corporation.

Another part of the picture is that the Columbia Engineering & Management Corporation, a subsidiary of the Columbia Gas & Electric Corporation, furnishes certain engineering and management service to the United Fuel Gas Company, the Ohio Fuel Gas Company, and the Columbus Gas & Fuel Company. A direct cost charge is made by the Columbia Engineering & Management Corporation for engineering services, and two and one-half per cent. of the gross earning is charged for executive management of each subsidiary of the parent company.

In Smith v. Illinois Bell Telephone Co., 282 U. S., 133, 51 S. Ct., 65, 75 L. Ed., 255, the Supreme Court of the United States has recently held that a federal District Court has jurisdiction to determine the profits which may reasonably accrue to a related company which sells its product to a public utility and to find the cost of any engineering or management service rendered by the parent company or any subsidiary to a public utility. This holding has been reiterated and even emphasized in Western Distributing Co. v. Public Service Commission of Kansas, 285 U. S., 119, 52 S. Ct., 283, 76 L. Ed., 655, as late as February 29, 1932. In that case, discussing a gate rate, the Supreme Court said:

"Where, however, they constitute but a single interest and involve the embarkation of the total capital in what is [fol. 102] in effect one enterprise, the elements of double profit and of the reasonableness of inter-company charges must necessarily be the subject of inquiry and scrutiny before the question as to the lawfulness of the retail rate based thereon can be satisfactorily answered. * * * It is enough to say that in view of the relations of the parties, and the power implicit therein arbitrarily to fix and maintain costs as respects the distributing company which do not represent the true value of the service rendered, the state authority is entitled to a fair showing of the reasonableness of such costs, although this may involve a presentation of evidence which would not be required in the case of parties dealing at arm's length and in the general and open market, subject to the usual safeguards of bargaining and competition."

We approach the decision of questions herein presented in the light of the principles laid down by the Supreme

Court of the United States and by this court. It is not the function of this court to fix rates. Under Ohio law, the city of Columbus has power to fix rates by ordinance, and did so fix the rate involved herein. The specific question is whether the rates so fixed are unreasonable, unlawful, and confiscatory. Upon that question the utilities have the burden of proof.

As stated by Mr. Chief Justice Hughes in the case of Los Angeles Gas & Electric Corp. v. Railroad Commission of California, 289 U. S., 287, 53 S. Ct., 637, 77 L. Ed., 820, decided May 8, 1933: "That question is whether the rates as fixed are confiscatory. And upon that question the complainant has the burden of proof and the Court may not interfere with the exercise of the State's authority unless confiscation is clearly established."

The specific question confronting us is the question whether the ordinance, enacted by the council of the city of Columbus and approved by a majority of the electors voting thereon in referendum, establishes a rate which is [fol. 103] unreasonable, unlawful and confiscatory. Section 614-46, General Code; Hocking Valley Ry. Co. v. Public Utilities Commission, 92 Ohio St., 362, 110 N. E. 952.

We start with the proposition that we deal here with properties admitted by the utilities to be thoroughly integrated and interconnected, constituting a single operating unit. In addition, the highest court of the country has held that the commission and this court have jurisdiction to inquire into the reasonableness of the profits secured by parent companies, or by related companies, or by engineering and management companies, in a situation such as this.

Conceding the fact that, as this product is private property, the utilities are entitled to a profit in the distribution of the product, the fact also remains that under the holdings of the United States Supreme Court, the utilities are under an obligation to render fair and equal service at a rate which will produce a just and fair return for the sale of the product.

The River Rate

The majority of the commission found that a reasonable and lawful rate per M. c. f. was 22.04 cents. The minority finding was 17.79 cents on the same rate. The valuations and the expense and return on investment, found for the

purpose of fixing this particular part of the rate by both the majority and the minority of the commission, were the same, with the exception of two items, both under the same general heading of expenses and return on investment. The majority of the commission found the production expenses to be $1,678,480, and the portion allocable to the Ohio Fuel Gas Company on M c. f. sales basis to be $608,053. The minority of the commission found production expenses to be $832,524, and the portion allocable to the Ohio Fuel Gas Company on M c. f. sales basis, $301,594. The majority [fol. 104] of the commission then allowed for depreciation and amortization $1,877,282, and the portion allocable to the Ohio Fuel Gas Company to be $680,071, and the minority made an allowance for the same item of $906,437, the portion allocable to the Ohio Fuel Gas Company for this item being $328,370. These two substantial differences resulted in the difference above set forth in the rate to be paid at the river for the gas delivered by the United Fuel Gas Company into the mains of the Ohio Fuel Gas Company, and thence to the Columbus Gas & Fuel Company for consumption in this city.

The difference between the majority and the minority of the commission with reference to the item of production expenses lay in the difference of their treatment of delayed rentals. The majority of the commission was of the view that as these were the figures presented before the West Virginia Commission in a gas rate case involving the property of the United Fuel Gas Company located in West Virginia, which testimony was offered entire in this hearing as evidence bearing upon the valuation of this property, the commission was compelled to make the same allowance for delayed rentals entering into production expenses as the West Virginia commission.

The minority of the commission found the same valuation of the physical property, but considerably diminished the allowance for delayed rentals upon the ground that under Ohio law there can be no allowance for delayed rentals in the case of nonproducing acreage.

With this conclusion of the minority of the commission we are in accord.

It was held by this court in the case of Logan Gas Co. v. Public Utilities Commission, 121 Ohio St., 507, 169 N. E., 575, that under the Ohio statutes, Sections 499-8, 499-9, 614-20, 614-23, etc., General Code, which order the valuation of a public utility upon the basis only of property used [fol. 105] and useful for the public service, there can be no allowance in valuation for nonproducing acreage. When the question is the rate which is to be paid in Ohio for gas delivered in Ohio, even if it comes from West Virginia, Ohio law must govern the valuation and rate based thereon.

With reference to the item of depreciation and amortization, the West Virginia commission allowed 1.12 per cent. for depreciation and 4.15 per cent. for amortization. These figures were carried over into their findings by the majority commission. We hold elsewhere in this opinion that amortization cannot be allowed under Ohio law. The Ohio statute provides for an allowance for depreciation but not for amortization. Section 499-9, General Code. The commission has no discretion in adding items of valuation not specified by the Legislature.

We therefore find that the river rate of 17.79 cents for gas delivered from West Virginia, fixed by the minority of the commission, is not unreasonable, unlawful, nor confiscatory.

The Gate Rate

The next question which we approach is the reasonable rate which is due to the Ohio Fuel Gas Company for the gas which it supplies to the Columbus Gas & Fuel Company. The two most important questions to be decided in this particular are what shall be the proper allocation of the Ohio Fuel Gas Company's property used and useful in furnishing gas to the city of Columbus, and what is the value of its gas-producing leaseholds.

Allocation

The city contends that production property of the Ohio Fuel Gas Company should be allocated upon the basis of sales, but that the transmission property should be allocated to the particular market in this locality upon the basis of mileage multiplied by the peak demands of the particular [fol. 106] municipality. The company contends, however, that there should be no particular allocation either of the

production or transmission property, to any one market except upon the basis of sales or consumption of gas. The city contends that this theory of allocation results in a statewide gate rate, that is, the same gate rate for each community in the state served directly or indirectly by the Ohio Fuel Gas Company, and that the city of Columbus is entitled to such a gate rate as is required by its demands and load factor and its distance from the source of supply. Both the majority and the minority holding of the Public Utilities Commission were in favor of the company upon this point.

The demand-mileage allocation method is not untried. It has been used in West Virginia. In re United Fuel Gas Co., P. U. R., 1918C, 193; In re West Virginia Central Gas Co., P. U. R., 1918C, 453; In re United Fuel Gas Co., P. U. R., 1920C, 583; In re Hope Natural Gas Co., P. U. R., 1921E, 418.

This method was used in United Fuel Gas Co. v. Railroad Commission of Kentucky (D. C.), 13 F. (2d), 510, a case affirmed by the Supreme Court of the United States in 278 U. S., 300, 49 S. Ct., 150, 73 L. Ed., 390, upon another point.

In the case in 13 F. (2d), Judge Hickenlooper said at page 522: "It therefore now becomes necessary that the determined rate base and the operating expenses be apportioned to the localities with which we are particularly concerned. We are of the opinion that production expenses and valuation, general property valuation, general expenses, and working capital should be apportioned on the proportionate sales basis, transmission, system valuation, and expenses upon the demand mileage basis, and distribution upon actual valuation of the distribution plants in the several municipalities and actual expenses there incurred."

The court is impressed with the fact that in this state the unit established by the Constitution for dealing with [fol. 107] public utility service is the municipality. Article XVIII, Sections 4 and 5. This circumstance was held to have great weight in Indiana, where the demand of various utilities that a common gate rate be fixed was denied upon the ground that in Indiana the city, and not the system, is the unit. Wabash Valley Electric Co. v. Singleton (D. C.), 1 F. Supp., 106; Indiana General Service Co. v. McCardle (D. C.), 1 F. Supp., 113. The Wabash Valley Elec-

tric Co. case was reviewed by the Supreme Court of the United States, Wabash Valley Electric Co. v. Young, 287 U. S., 488, 53 S. Ct., 234, 77 L. Ed., 348, and the opinion of the court was delivered upon January 9, 1933. The question of allocation was considered in the case, Mr. Justice Sutherland delivering the opinion of the court. We quote a pertinent part of the decision upon the question of allocation, as follows:

"The court below held that under the provisions of the state statute and in the light of the facts, not the entire property and system of appellant, but the City of Martinsville alone should be treated as the unit for the purpose of determining the schedule of rates to be charged therein. The commission, as well as the master, had reached the same conclusion. * * * "

"Appellant's chief contention is that its entire operating property should be taken as a unit in fixing the rate base, and that the action of the court in failing to do so deprived it of its property without due process of law."

The court cites a decision of the Supreme Court of Wisconsin, City of Eau Claire v. Wisconsin-Minnesota Light & Power Co., 178 Wis., 207, 220, 189 N. W., 476, which determined that the Wisconsin commission was required to treat the municipality as a unit and to base its rate upon the cost to the utility of serving the individual municipality rather than the average cost of serving many distinct and scattered municipalities, Mr. Justice Sutherland, sum- [fol. 108] marizing the decision of the Wisconsin court, points out that the Legislature must have regarded the municipality as the entity on the one hand and the utility as the entity on the other, for the purpose of establishing just and reasonable rates and service, and then states: "Since the Indiana act was patterned after the Wisconsin act with a like history and attended by similar circumstances, the court below felt warranted in following the decision of the Wisconsin court; and with that view we see no reason to disagree."

Every argument that can be made in Indiana and Wisconsin with reference to the legislative policy of regarding the municipality as the entity to deal with the utility for the purpose of establishing just and reasonable rates and serv-

ice may be and is reiterated here under the far-reaching Home Rule provisions of the Ohio Constitution.

Just why the city of Columbus should be charged for the pipe lines extending to Indiana, to Toledo, and to Cincinnati, we cannot understand. By the preponderance of the evidence, the transmission lines north and northeast of Columbus do not contribute to the Columbus gas supply, and the gas rate in Columbus should not share any part of the cost, maintenance or depreciation of these lines. The test is what portion of the wells, the compressor stations, and the pipe lines is devoted to each city or community, and the method of allocation adopted by the majority and the minority of the commission was erroneous. If the proper method of allocation had been adopted, the gate rate found would have been materially decreased.

We hold that the unit of allocation in this case is not the system, but the locality, and quoting Judge Hickenlooper, supra, that "production expenses and valuation, general property valuation, general expenses, and working capital should be apportioned on the proportionate sales basis, transmission, system valuation, and expenses upon the de- [fol. 109] mand mileage basis, and distribution upon actual valuation of the distribution plants in the several municipalities and actual expenses there incurred."

Leaseholds

The next question which arises is as to the fair valuation of the leaseholds owned by the Ohio Fuel Gas Company and used in the conduct of its business. This court has held in a previous valuation case that the method of using cost to determine value of leaseholds did not give due regard to the value of the property used and useful. No valuation can be based upon market price because of the fact that there is no market for a gas property so extensive as that of the Ohio Fuel Gas Company.

In the case of Logan Gas Co. v. Public Utilities Commission, 121 Ohio St., 507, 169 N. E. 575, classes 2, 3 and 4 leaseholds (non-producing) were excluded from the valuation upon the ground that the property was not used and useful, and that decision was sustained by this court. In the case of Logan Gas Co. v. Public Utilities Commission, 124 Ohio St., 248, 177 N. E., 587, this court in a per curiam opinion sustained the commission in basing its val-

uation of class No. 1 leaseholds (producing) under Section 499-9, General Code, upon book value and not upon market value. Because the valuation found in the Logan Gas Company case was $25 per acre, both the majority and the minority of the commission in this case fixed a valuation upon class No. 1 leaseholds (producing) of $25 per acre, it being conceded in each finding that this valuation is approximately $2,500,000 more than the present book value of all leaseholds of the Ohio Fuel Gas Company and the Logan Gas Company combined, eliminating, as stated in the minority opinion, the "arbitrary write up" of approximately $3,700,000 in the Logan Gas Company's leaseholds made during 1919. In valuing these leases at more than the [fol. 110] book value under this record, the commission was in error. The commission was also in error in including in its valuation the book value of all leaseholds. Only the present book value of class No. 1 leaseholds (producing) may be allowed.

It was held in United Fuel Gas Co. v. Railroad Commission of Kentucky, supra, that for rate base purposes, gas acreage belonging to a natural gas company should be valued at its book value rather than on the basis of its earning capacity. The court adverts to the fallacy of the argument that because of the earning capacity and large return allowed, the property has greatly increased in value, and that such increased value should thereupon be taken as the basis of another calculation of a still larger return. The holding of that case was affirmed by the United States Supreme Court in the case of United Fuel Gas Co. v. Railroad Commission of Kentucky, 278 U. S., 300, 49 S. Ct., 150, 73 L. Ed., 390.

This same fallacy has been pointed out by Mr. Justice Hughes in the Minnesota Rate Cases, 230 U. S., 352, 33 S. Ct., 729, 57 L. Ed., 1511, 48 L. R. A. (N. S.), 1151, Ann. Cas., 1916A, 18, and by Mr. Justice Brandeis in his concurring opinion in State of Missouri, ex rel. Southwestern Bell Telephone Co., v. Public Service Commission of Missouri, 262 U. S., 276, 43 S. Ct., 544, 67 L. Ed., 981, 31 A. L. R., 807.

The court in United Fuel Gas Co. v. Railroad Commission of Kentucky, supra, felt itself constrained, in the absence of market value, and under the rule just stated that earning capacity should not be taken into consideration for estab-

lishment of the rate basis, to hold that the best, if not the only evidence of value in the record was the book value.

In view of this holding of the United States District Court, and the specific holding of this court in Logan Gas Co. v. Public Utilities Commission, 124 Ohio St., 248, 177 N. E., 587, we hold that the value of class No. 1 leases should [fol. 111] be reduced to book value, and reduced to the book value of class No. 1 leases alone.

Going Concern

The members of the commission were unanimous in the disallowance of going concern value as a separate item. In a number of cases this court has affirmed such action by the commission. City of Cincinnati v. Public Utilities Commission, 113 Ohio St., 259, 148 N. E., 817; Hardin-Wyandot Lighting Co. v. Public Utilities Commission, 118 Ohio St., 592, 162 N. E., 262; Logan Gas Co. v. Public Utilities Commission, 121 Ohio St., 507, 169 N. E., 575. Similarly the Supreme Court of the United States in a recent case, Los Angeles Gas & Electric Corporation v. Railroad Commission of California, supra, refused a going value claim of approximately nine million dollars.

This court is of the opinion that in the instant case this refusal was proper.

Taxes and Overheads

Upon the allowances made for taxes and general and direct overheads, we have given careful consideration to the opinion of both the majority and the minority of the Public Utilities Commission and have reached the conclusion, upon the entire record, that while there is no great difference between the majority and minority findings as to values and percentages taken, the figures presented and estimates made by the minority report are fair and just.

We are not unmindful of the economic conditions which now exist and which have existed since the beginning of this rate case and prior thereto. It is our conclusion that the record requires that the findings of the minority report upon the question of taxation and general and direct overhead be found to be reasonable and lawful.

Attention may be called to the case of Los Angeles Gas [fol. 112] & Electric Corp v. Railroad Commission of California, 289 U. S., 287, 53 S. Ct., 637, 77 L. Ed., 820, decided

by the Supreme Court of the United States on May 8, 1933. The opinion in that case, relative to the value of gas plant properties, states: "The estimates of present value, taken as the cost of reproduction as of December 31, 1929, based upon average prices from 1926 or 1927 to 1929, furnished no dependable criterion of values in the succeeding years. The country was facing a most serious decline in prices. It was entering upon a period of such depression as to constitute 'a new experience to the present generation.'"

Much that is said in the opinion is relevant in this case: "The actual cost of the property—the investment the owners have made—is a relevant fact. Smyth v. Ames, 169 U. S., 466, 547 [18 S. Ct., 418, 42 L. Ed., 819]. But, while cost must be considered, the Court has held that it is not an exclusive or final test. The public have not underwritten the investment. The property, on any admissible standard of present value, may be worth more or less than it actually cost. The time and circumstances of the outlay, and the effect of altered conditions demand consideration. Even when cost is revised so as to reflect what may be deemed to have been invested prudently and in good faith, the investment may embrace property no longer used and useful for the public. This is strikingly illustrated in the present case, where the Company has a large gas manufacturing plant which, in view of the supply of natural gas, has not been used for several years and is not likely to be used for many years to come, if at all. But no one would question that the reasonable cost of an efficient public utility system 'is good evidence of its value at the time of construction.' We have said that 'such actual cost will continue fairly well to measure the amount to be attributed to the physical elements of the property so long as there is no change in the level of applicable prices.' McCardle v. [fol. 113] Indianapolis Water Co., 272 U. S., 400, 411 [47 S. Ct., 144, 148, 71 L. Ed., 316]. And when such a change in the price level has occurred, actual experience in the construction and development of the property, especially experience in a recent period, may be an important check upon extravagant estimates."

Depreciation and Amortization

Depreciation is the reduction of worth. Amortization is the extinguishment of an existing debt or claim by means of a fund created for that purpose.

Sections 499-8, 499-9 and 614-46, General Code, deal particularly with the legislative processes that the Public Utilities Commission must use in evaluating the properties of public utilities. Section 499-8, General Code, provides that when the commission deems it necessary it may "investigate and ascertain the value of the property of any public utility used and useful for the service and convenience of the public."

Section 499-9, General Code, provides how the valuation shall be made. This section provides that the report of the commission on value shall show certain facts as specified in paragraphs A to H, inclusive. Paragraph E deals with "depreciation," as follows: "Depreciation, if any, from the new reproductive cost as of a date certain, for existing mechanical deterioration, for age, for obsolesence, for lack of utility *or for any other cause*, the percentage and amount of each class of depreciation, if any, to be specifically set forth in detail."

Paragraph D deals with new production, as follows: "The cost of new production as of a date certain, of all physical property other than land, owned and used by such public utility or railroad, showing the values of the separate items comprising such property, together with the unit basis of such valuation."

Paragraph F provides that: "The net value as of a date certain, of all physical property other than land owned [fol. 114] by such utility or railroad, to be derived by deducting the sum of the amounts of depreciation from the sum of the new reproductive costs."

We are not losing sight of the theory of "accrued and future depreciation," and we are not hostile to the doctrine that accrued depreciation should not be deducted from the sum of the new reproductive costs.

In considering the items of depreciation and amortization we are keeping in mind Section 614-46, General Code, which provides that the rate fixed by the Public Utilities Commission shall be "fair and reasonable."

Section 614-49, General Code, provides for the carrying of a depreciation account by public utilities.

Section 614-50, General Code, provides that money set aside for depreciation purposes must be expended for such purposes and no other, except upon the approval of the Public Utilities Commission.

There is no provision for amortization under the laws of Ohio. Where the life of a utility's product is uncertain, can it be intelligently and fairly amortized? We think not.

The contention that there should be an allowance by way of amortization sufficient to return the entire investment of the company to the stockholders during the period of the life of the business is untenable, as the business has no fixed life.

As bearing on the question of the certainty of the life of the business, the gas company places much stress on the testimony of practical gas men, to the effect that they could not predict a longer life than twenty-five years for the company. Practical experience teaches us that this is a mere prophecy. The gas business will continue so long as natural gas can be taken from the earth in the fields controlled by the parent corporation, in paying quantities. History along this line reveals the fact that the testimony of experts as to the probable life of natural gas is unreliable, [fol. 115] and it is for this reason that amortization is guesswork. An allowance for amortization such as contended for by the company would place an unwarranted burden upon the present consumers of gas. The stockholders of the gas company at no time had any right to anticipate that the law would, in addition to dividends, at some time hand them back their original investment. The nature of the natural gas business has been precarious at all times; but so long as it has continued to function, its returns have been reasonably liberal.

Capital does not feel its way to an enterprise in this day and age. Investors investigate the vices and virtues of a proposition before investing. Public utilities, and natural gas companies in particular, advance the theory that they are public servants, furnishing the public with a perishable commodity; that their product is short-lived; that when their product dies they are left with an expensive property that cannot be utilized for other purposes; and that it is only fair, during the life of the company, that its investment should be returned to it by way of amortization.

That the product natural gas will eventually die is self-evident. When it will die is an assumption. An assumption is no stronger than the facts that support it, and it is just and fair to assume that much of the equipment now

used in the transportation and distribution of natural gas will be utilized for the transportation and distribution of artificial gas in the future.

We must accredit to the men who organize and manage public utility corporations in which millions are invested, a higher degree of intelligence and a keener foresight than that of the ordinary individual. Hence to say, or even to think, that upon the failure of natural gas the entire property of a natural gas company would be scrapped would be a puny tribute to those responsible for its conduct.

The evaluation of the property of a public utility is [fol. 116] governed solely by the statutes of Ohio. The Public Utility Commission of Ohio is the agency employed by the state in making valuations and fixing thereon rates of return. In the exercise of this power, does it have a discretion?

Depreciation is an incident to valuation. In considering the item of depreciation the court takes judicial cognizance of the fact that the trend of material and labor cost is downward. The case of Bluefield Water Works & Improvement Co. v. Public Service Commission of West Virginia, 262 U. S., 679, 43 S. Ct., 675, 67 L. Ed., 1176, is followed and approved in the case of Los Angeles Gas & Electric Corporation v. Railroad Commission of California, supra. In the opinion, Chief Justice Hughes quotes the Bluefield Water Works case, as follows: "A 'public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures.'"

It will be remembered that the Supreme Court of the United States in this case was considering but one question, "Was the rate fixed by the Railroad Commission confiscatory?" It disclaims all supervisory power. This court has none other than a supervisory jurisdiction in cases of this character, as provided by Article IV, Section 2, of the Constitution of Ohio, and conferred by Sections 544 et seq., General Code.

Counsel for the gas company, in their brief in case No. 23868, quote from the case of Board of Public Utility Commissioners v. New York Telephone Co., 271 U. S., 23, 46 S. Ct., 363, 70 L. Ed., 808: "Customers pay for service, [fol. 117] not for the property used to render it. Their payments are not contributions to depreciation or other operating expenses, or to capital of the company. By paying bills for service they do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company. Property paid for out of moneys received for service belongs to the company, just as does that purchased out of proceeds of its bonds and stocks."

We have no quarrel with this law, but we find in it no argument in favor of amortization. If amortization is to be allowed this company, it should be based on the probable life of the business and not on the probable life of its producing wells. The commission did allow $4,158,954 for amortization annually, based upon a life expectancy of three years and two months for producing wells. It is conceded that the life of the company will be at least twenty-five years. Hence, if amortization was allowable under the laws of Ohio, it should be spread over the twenty-five years. Unless amortization can be converted into some sort of depreciation there is no authority in law for such a charge in this state.

It may be insisted that unless a reasonable amount is allowed annually for amortization a fair rate basis cannot be attained. That may be true, but the Legislature has prescribed a valuation formula. If this formula is unfair to the utility, unless and until it reaches the point of confiscation, the remedy is with the Legislature and not with the courts.

We find that the majority report of the Public Utilities Commission treats "depreciation" and "amortization" as one item. It states under the subhead of "Depreciation and Amortization": "The proper treatment of this charge against the income of the company presents a most difficult question, which cannot be determined with mathematical precision but must finally rest upon sound judgment, guided by such information as may be gleaned from the [fol. 118] record. Depreciation proper concerns the life of the plant as affected by agencies which, operating

usually through a period of years, will ultimately reach a point requiring the replacement of the plant or certain parts thereof.".

The substantial provisions of Section 499-9, General Code, are as follows: "Depreciation, if any, from the new reproductive cost as of a date certain, for existing mechanical deterioration, for age, for obsolescence, for lack of utility *or for any other cause.*"

And Section 614-49, as follows: "The charge for depreciation shall be such as will provide the amount required over and above the cost and expense of maintenance to keep the property of the public utility in a state of efficiency corresponding to the progess of the art or industry."

And Section 614-46, General Code, the section, as stated by the Public Utilities Commission, under which this case is being tried, provides that a fair price shall be fixed, with due regard "to the necessity of making reservations from the income for surplus, depreciation and contingencies."

Thereupon follows a fair and reasonably liberal statement as to the application of the law of depreciation. Then the subject of amortization is treated separately.

It would seem from the treatment of this subject that the Public Utilities Commission felt, from the statutes quoted, that it had been vested with some degree of discretionary power to make an allowance for amortization, as it in so many words admits there is no statutory authority covering the item of amortization. The word "depletion" is used and an aftempt is made to justify amortization as a species of depreciation.

Notwithstanding the commission treats amortization and depreciation conjointly and separately, the gas company claims that in addition to all allowances made the com- [fol. 119] mission should have allowed amortization sufficient to return the entire investment of the company to the stockholders during the period of the life of the business.

The Public Utilities Commission, as we take it, has no vestige of discretion in evaluating the property of a public utility. Section 499-9, General Code, does contain language that would seem to delegate a discretionary power to the commission, as follows: "Depreciation, if any, * * *, for existing mechanical deterioration, for

age, for obsolescence, for lack of utility *or for any other cause.*" Paragraph E.

The words "or for any other cause" at first blush open a wide vista, but when we apply the limitation "existing mechanical deterioration" it gives a far different meaning. Each of these words is limited by the other in inverse order. The subject being dealt with is "deterioration." What kind of deterioration? Mechanical deterioration. When? Now, existing mechanical deterioration.

Section 614-49, General Code, is to the effect that the commission shall not be parsimonious in making its allowance for depreciation, but that it shall allow enough "over and above the cost and expense of maintenance to keep the property of the public utility in a state of efficiency corresponding to the progress of the art or industry." This section delegates no discretionary power.

Section 614-46 provides that in fixing a rate, price, charge, toll or rental, due regard shall be had to the necessity of making reservations from the income for surplus, depreciation and contingencies. This section simply furnishes some side lights by which the commission must be guided in dealing with public utilities. It employs no language suggestive of a delegation of discretionary power, hence we must hold that the Public Utilities Commission of Ohio has no discretionary power in "ascertaining the [fol. 120] value of the various kinds and classes of property of each public utility," but it must keep within the bounds prescribed by Section 499-9, General Code, as liberalized by Sections 614-46 and 614-49, General Code.

The Public Utilities Commission further states:

"The Ohio Fuel Company under its set-up claims an annual depreciation allowance of $1,420,241.00 and for amortization an annual allowance of $5,449,221.00, a total annual charge of $6,869,462.00. The question of depreciation as presented by each side to this controversy will be found in company's brief, page 69, et seq., and in City's brief, page 342, et seq. As against the claims of each party the concurring commissioners, with the assistance of the Commission's engineers, have arrived at the conclusion that 1½% of the present value of the depreciable property, being all of the physical property, with the exception of lands and rights of way, would correctly represent the

average amount that should be set aside for depreciation reserve. This amount produces $667,612.00. As to amortization we have considered the evidence disclosing that the average life of an Ohio well is seven and one-half years. The depreciation estimated from present rock pressure of each well discloses that there is at this time a depreciation of 58.1126%, leaving the present value of these items of 41.8874% of the original value of the leaseholds.

"Considering the present condition of these wells the remaining life expectancy is an average of three years and two months. We have considered that accounts 211, gas well construction, and 212, gas well equipment and leaseholds, are all subject to the proper amortization for the reasons already set forth. Considering the present value of the three items in reference to the remaining life expectancy we find that the annual amortization should be $4,158,954.00. The two items of depreciation and amortization amount annually to $4,826,566.00.

[fol. 121] "These allowances should be devoted to the purposes of depreciation and amortization alone and if necessary to be invested they should be invested in compliance with the statute and must not be devoted to any other purpose or used for paying dividends. If they are so conserved and used they will afford a fund from which the company may from time to time draw funds sufficient to keep the plant in effective operation. If the funds should be appropriated to other purposes, the time might well arrive when the company may not have available, and may not be able to obtain the necessary capital to restore depleted property."

This would be good law, if it were the law. But we just cannot read amortization into the law of Ohio. The Legislature had its reason for not making a provision for amortization in the legislative formula provided for evaluating the properties of public utilities. How can an allowance for new production and amortization be reconciled? How can you spread amortization over the uncertain life of a natural gas company? The commission undertakes to spread it over the life of producing wells. If amortization were permissible under the statute, this rule could not be indulged.

The commission holds that life expectancy of the gas company's producing wells is three years and two months, and on this basis there should be an annual amortization of $4,158,954. With this finding of the commission this court cannot agree.

As indicated in the discussion above, the application of the principles laid down would result in a valuation even less in material parts than that arrived at by the minority of the commission. It follows that the court holds that the rate established by the ordinance in question is neither unreasonable, unlawful, nor confiscatory.

These conclusions necessitate a reversal of the order of the commission both in error proceeding No. 23868, in which the city of Columbus, Ohio, prayed that the finding [fol. 122] and order of the commission be reversed or vacated, and in error proceeding No. 23864, instituted by the utility, praying that the order of the commission be vacated. In case No. 23867 the city of Columbus had filed a separate error proceeding, praying in substance that the commission might be directed and ordered first to find and file tentative valuations of the properties involved in the case and to proceed in respect thereto in accordance with the statutes governing such tentative valuations.

The objection presented in this petition in error is that the commission irregularly and unlawfully made its findings and fixed the rate without having first fixed, filed and announced tentative valuations of the properties to which any interested party might file objections or protests, in violation of Section 499-12, General Code, and other sections of the statutes applicable thereto.

Since we have reversed the order of the commission, this petition in error in case No. 23867 now presents a question which has become moot, and therefore without ruling upon the question therein presented, error proceeding No. 23867 will be dismissed.

Order reversed in causes Nos. 23864 and 23868.

Petition in error dismissed in cause No. 23867.

Weygandt, C. J., Day, Allen, Stephenson and Matthias, JJ., concur.

Bevis, J., not participating.

DISSENTING OPINION

JONES, J., dissenting:

On the eve of adjournment there is not time to amplify one's views in these cases, but I wish to say that this case is more far reaching in its tendencies than any other reported case that has come to my attention. Briefly stated, I dissent from the legal principles here announced for various reasons, among which are the following:

[fol. 123] Although the commission made a partial allowance therefor, the majority decision permits no allowance for depletion or amortization of utilities in cases such as these, where the annual drain upon their gas field resources by way of gas depletion is so heavy, eventually amounting to total exhaustion. Such a decision, in my judgment, where a low rate is fixed, tends to pure confiscation of property.

The decision, by considering book values as a basis of valuation, in face of overwhelming expert testimony establishing higher values, is, in that respect, erroneous.

The disallowance for delayed rentals and of valuation for the gas reserve leases, which are designated as "Class No. 2," is, in my judgment, erroneous. "Class No. 2" is used and useful as a reasonable reserve gas property, and should have been given a reasonable valuation. The theory advanced that a tract held in reserve may be capitalized only if and when it is being actually operated is obviously unsound. It might as well be argued that a set of steam boilers, held in reserve for unforeseen contingencies but not presently operated, should not be valued until they were being put into actual use. The utility's gas territory is its chief and necessary asset; its extent being measured by the requirement of all the communities which it is called upon to serve and the reasonable cost of service should be allocated among them. This utility is required to and does provide for the needs of the public in many sections of the state. In view of the short period of life which the commission found that "Class No. 1" (the tract being actually operated) had, and especially in view of longer periods of

municipal franchises which the utility may be compelled to fulfill, a reasonable valuation for gas tract No. 2 held in reserve should have been allowed; otherwise no long-term public franchise contract could be safely entered into, either by the utility or the municipality. Because of the [fol. 124] peculiar hazards of the business and of inevitable gas exhaustion resulting in so short a period as that found by the commission (being presently three years and two months), ordinary business sense would require a reasonable gas tract reserve, in addition to the tract that is being actually operated, in order to supply the public's future needs. That situation, which is now so evident, did not so clearly appear when we decided the case of Logan Gas Co. v. Public Utilities Commission, 121 Ohio St., 507, 169 N. E., 575.

[fol. 125] Reporter's certificate to foregoing paper omitted in printing.

[fol. 126] IN SUPREME COURT OF OHIO

THE DAYTON POWER & LIGHT CO.

v.

PUBLIC UTILITIES COMMISSION OF OHIO

Public Utilities Commission—Increased Natural Gas Rates—Section 614-20, General Code—New Schedules Stricken from Files—Gate Rate—General Administrative Expense—Annual Depreciation and Expense—Taxes—Reorganization Expense—Distribution Line Equipment—General Overhead—Financing Cost—Going Concern Value—Working Capital

(No. 23893—Decided June 21, 1933)

Error to the Public Utilities Commission

This matter comes to this court from the Public Utilities Commission upon petition in error of the Dayton Power & Light Company. A brief summary of the claims is as follows:

On June 17, 1929, the Dayton Power & Light Company filed with the Public Utilities Commission new schedules

of rates and charges for the cities of Sidney, Washington C. H., Troy, Piqua, and certain villages, which schedules increased the rates for natural gas over what had previously been charged. Under the provisions of the Pence Law, Section 614-20, General Code (110 Ohio Laws, 366), said company gave bond pending the hearing by the commission as to the reasonableness of the new schedules.

[fol. 127] Hearings were had from time to time, and on November 3, 1932, the commission ordered that said new schedules be stricken from its files and that the power and light company cease charging and collecting the rates therein contained; that such company be required within thirty days to refund to each consumer the difference (with interest thereon at 6 per cent. from the date of payment of such charge to the date of refund) between the charges imposed and collected under the new schedules, under the authority of the bond given, and the rates and charges which would have obtained under the prior rates and prices which were sought to be superseded by the new schedules; and that any money not claimed should be paid to the county treasurer of the proper county where such municipalities are located, and the commission retained jurisdiction for the purpose of such audits as might be necessary in respect thereto.

Plaintiff in error makes many allegations of error in the order of the commission, claiming deprivation of its property without due process of law, and denial of equal protection of the laws; that the charges which it may collect under the order of November 3, 1932, are confiscatory and insufficient to yield such company reasonable compensation for the natural gas service rendered and to be rendered by it; that said rates to be charged do not give due regard to the value of the company's property actually used and useful for supplying natural gas service to such municipalities and their inhabitants; that said orders do not give due regard to the city gateway contracts existing between the Dayton Company and the Ohio Fuel Gas Company, whereunder the Dayton Company receives its supply of natural gas, and that they violate Section 10, Article I, of the United States Constitution, by impairing the obligation of such contracts, and are erroneous.

It also claims that said finding is repugnant to the power given to Congress to regulate commerce among the several

[fol. 128] states, in that an attempt is made to regulate the price for natural gas to be paid by the Ohio Fuel Gas Company in the United Fuel Gas Company for natural gas produced in West Virginia and Kentucky and transported in interstate commerce from points in the state of West Virginia to the several gateways of the municipalities, where it is delivered by the Ohio Fuel Gas Company to the Dayton Power & Light Company.

Plaintiff in error also claims that the commission erred in fixing the price of natural gas at the gateways of the municipalities at 39 cents per thousand feet, instead of 45 cents per thousand, the price which the Dayton Company is obligated to pay under its contracts with the Ohio Fuel Gas Company.

Other allegations relate to the valuations fixed upon various items of the plaintiff in error's property, and findings relating thereto which were made by the Public Utilities Commission.

A statement of the chief differences between the claims of the plaintiff in error and those of the defendant in error would be, in substance, as follows:

(1) The difference in the rate allowed by the commission for the purchase of natural gas, known as the gate rate, which is 39 cents, instead of the contract price with the Ohio Fuel Gas Company claimed by the plaintiff in error, which is 45 cents.

(2) The commission allowed about $6,000 less than the company claim on general administrative expense, the entire difference being the service fee of the Columbia Engineering & Management Corporation, another wholly owned subsidiary of the Columbia system. The commission found 56.6 per cent. of these management fees were justified on the basis of value received.

(3) Annual depreciation and allowance. The Dayton Company claimed 4 per cent. on engineering testimony (Ford, Bacon and Davis) the allowance made by the com- [fol. 129] mission in the sum of $13,721 representing 2 per cent. of the total depreciable plant of the Dayton Company allocable to this territory.

(4) Differences are also claimed as to taxes.

(5) Preorganization expenses.

(6) Distribution line equipment, the entire difference being due to the commission disallowing the cost of paving over mains which were laid before the paving was put in place. Des Moines Gas Co. v. City of Des Moines, 238 U. S., 153, 35 S. Ct., 811, 59 L. Ed., 1244; Newark Natural Gas & Fuel Co. v. City of Newark, 92 Ohio St., 393, 111 N. E., 150.

(7) As to general overheads, the commission allowed 14 per cent. being the same as allowed the Ohio Fuel Gas Company in the Columbus case, and is more than that allowed in the Columbus Gas & Fuel Company case.

(8) As to cost of financing, the company claimed 4 per cent. of value of physical property. The commission in this matter claimed to have followed the decision in the case of Wabash Valley Electric Co. v. Young, 287 U. S., 488, 53 S. Ct., 234, 77 L. Ed., 348, decided by the Supreme Court of the United States on January 9, 1933; also the case of the Portsmouth Gas Co. v. Public Utilities Commission, 119 Ohio St., 24, 162 N. E., 106.

(9) As to going concern value, the commission took the view that the burden was on the company in this matter, and found failure of proof in that behalf.

(10) As to working capital, the commission allowed $61,880. The company claimed $83,200. The commission allowed one and one-half months' operating expense, plus one month's gas purchase, $38,755, plus materials and supplies equaling $5,218. The working capital then being summarized as $17,907 for one year's operating expense, excluding gas purchase and allowance for depreciation, $38,755 for one month's gas purchase, $5,218 for materials and sup- [fol. 130] plies, making the allowance for working capital $61,880.

The foregoing are the chief differences between the claims of the plaintiff in error, the Dayton Power & Light Company, and the defendant in error, the Public Utilities Commission of Ohio. Other questions are presented, but these are the most important ones and it is unnecessary to give specific mention of other claims in greater detail.

Mr. Edwin P. Matthews, Mr. John E. Mullin, Mr. Charles P. Pfarrer and Mr. Chester J. Gerkin, for plaintiff in error.

Mr. John W. Bricker, attorney general, and Mr. Thomas J. Herbert, for defendant in error.

OPINION

By the COURT:

The principles of law necessary to the decision of this case have been considered in the case of the Columbus Gas & Fuel Company v. Public Utilities Commission of Ohio, ante, 100, this day decided by this court. These two cases are closely allied and interrelated and much of the record in the Dayton case was stipulated from the record in the Columbus case.

Applying the reasoning and conclusions of law announced in the Columbus case to the instant case we find no error in the conclusions of the Public Utilities Commission, and that the conclusions of fact found by the commission are justified by the evidence. Our conclusion, therefore, is that the findings of the Public Utilities Commission are neither unreasonable nor unlawful, and the same are hereby affirmed.

Order affirmed.

Weygandt, C. J., Day, Allen, Stephenson and Matthias, JJ., concur.

Bevis, J., not participating.

[fol. 131] Reporter's Certificate to foregoing paper omitted in printing.

[fol. 132] IN SUPREME COURT OF OHIO

No. 23893

DAYTON POWER & LIGHT CO.

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Error to the Public Utilities Commission of Ohio

JUDGMENT—June 21, 1933

This cause came on to be heard upon the transcript of the Record of the Public Utilities Commission of Ohio and

was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court, that the order of the said Public Utilities Commission of Ohio be, and the same is hereby, affirmed for the reasons stated in the opinion filed in this case; and it appearing to the Court that there were reasonable grounds for this proceeding in error, it is ordered that no penalty be assessed herein.

It is further ordered that the defendant in error recover from the plaintiff in error its costs herein expended taxed at $—.

Ordered, That a special mandate be sent to the Public Utilities Commission of Ohio, to carry this Judgment into Execution.

I, Seba H. Miller, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing entry is truly taken and correctly copied from the Journal of said Court.,

Witness my hand and the seal of said Court this 4th day of August, A. D. 1933.

Seba H. Miller, Clerk, by Frank Welling, Deputy.
(Seal.)

[fol. 133] IN SUPREME COURT OF OHIO

[Title omitted]

APPLICATION FOR REHEARING—Filed July 19, 1933

To the Honorable the Judges of Said Court:

The Dayton Power and Light Company, plaintiff in error, by its counsel, hereby applies for a rehearing of this case. Counsel for the plaintiff in error believe that, because of the very voluminous record, as well as for other like reasons, they failed to get the attention of this court to certain questions of fact peculiar to this case and of grave importance to the plaintiff in error, as well as to certain questions involved in both this case and the Columbus Gas & Fuel Company case, which are of vital importance, not only to the plaintiff in error, but to all public utilities, particularly natural gas utilities, doing business in the state of Ohio.

The following are very respectfully submitted as reasons calling for a rehearing:

[fol. 134] I

This Case Differentiated from Columbus Gas & Fuel Company Case—It Was Error to Hold This Case Was Determined by Decision in That Case

1. This court rendered its said decision affirming the order and findings of the defendant in error upon the assumption as stated in its opinion, that,

"The principles of law necessary to the decision of this case have been considered in the case of the Columbus Gas & Fuel Company v. Public Utilities Commission of Ohio, this day decided by this court. These two cases are closely allied and inter-related and much of the record in the Dayton case was stipulated from the record in the Columbus case.

"Applying the reasoning and conclusions of law announced in the Columbus case to the instant case, we find no error in the conclusions of the Public Utilities Commission and that the conclusions of fact found by the commission are justified by the evidence. Our conclusion therefore is that the findings of the Public Utilities Commission are neither unreasonable nor unlawful, and the same are hereby affirmed"—

whereas, in truth and in fact, this case differs in many important particulars from the case of Columbus Gas & Fuel Company v. Public Utilities Commission of Ohio; the facts are different, and there are important questions involved in this case which were not decided or involved in that case. The following considerations show that the said assumption of this court is erroneous:

[fol. 135] (1) The evidence in the Columbus Gas & Fuel Company case is pertinent to only two questions involved in this case, to wit: (a) the price paid by the plaintiff in error to the Ohio Fuel Gas Company for gas and (b) certain fees paid by the plaintiff in error to the Columbia Engineering & Management Corporation for management services, etc. All questions pertinent to the value of the property of the plaintiff in error, the necessary rate of return and all operating expenses, except the price paid for gas and the said management fees, are established by the evidence introduced directly in this case.

(2) There is no conflict of evidence in this case. All the testimony in the case was introduced by the plaintiff in error. Neither the complaining towns nor the defendant in error introduced any evidence. The competency and credibility of the witnesses for the plaintiff in error has not been questioned. The several relevant facts on which findings were made by the defendant in error and affirmed by this court in disregard of the uncontradicted, competent and credible evidence introduced by the plaintiff in error are hereinafter set forth in detail.

(3) In this case the plaintiff in error gave bond to repay to consumers the difference between the rates collected under the schedules in controversy and the rates which should be determined to be lawful, if the rates in controversy should be held unlawful; and the order of the defendant in error under review in this case, and the decision of this court affirming said order, requires the plaintiff in error to refund to consumers the difference between the rates collected under the schedules in controversy and the [fol. 136] rates fixed by the order of the defendant in error here under review. Thus the question of confiscation of property of the plaintiff in error is directly and immediately involved. No question of refund is involved in the case of Columbus Gas & Fuel Company v. Public Utilities Commission of Ohio.

2. Evidence Stipulated into this Case from Columbus Gas & Fuel Company Case Bears only on Town Gate Price of Gas.—The stipulation in this case under which the evidence taken before the defendant in error in the case of the Columbus Gas & Fuel Company v. City of Columbus, and the findings and determinations of the defendant in error made in that case, relate only to the evidence and determination by the defendant in error of the fairness and reasonableness of the price paid by the plaintiff in error to the Ohio Fuel Gas Company for gas, and the right of the plaintiff in eror to include in its operating expenses the price so paid, under certain contracts in evidence, and did not contemplate the use in this case of the evidence in the Columbus Gas & Fuel Company case, or the findings and conclusions of the defendant in error therein, for any other purpose. The stipulation, filed October 25, 1932, provides for the admission in this case of

"* * * so much of the evidence taken (in the Columbus case) as bears on the reasonableness and lawfulness of the price which the Columbus Gas and Fuel Company pays to the Ohio Fuel Gas Company for gas furnished and delivered at the city gate of the city of Columbus * * *."

[fol. 137] Nevertheless, this court has treated and decided the case as if the evidence introduced in the case of Columbus Gas & Fuel Company v. City of Columbus, which, in this court, appears as Columbus Gas & Fuel Company v. Public Utilities Commission of Ohio, No. 23864, applied to the valuation of the property of the plaintiff in error, the rate of return which should be allowed the plaintiff in error, and all other questions involved in this case, whereas, none of the evidence introduced in the Columbus Gas & Fuel Company case related to the value of the property of the plaintiff in error, or the rate of return which should be allowed the plaintiff in error, or any other question involved in this case, except the contract price of gas and certain management fees. Consequently, even if the legal principles enunciated in the Columbus Gas & Fuel Company case be controlling so far as pertinent, that does not dispose of the questions arising by reason of the fact that the defendant in error ignored uncontradicted testimony given by witnesses whose competency and credibility are not questioned as to material facts different from those involved in the Columbus Gas & Fuel Company case.

Wherefore, this court, by disposing of this case and affirming the findings and order of the defendant in error herein on the assumption and holding that this case is controlled by the principles of law and decision in the case of Columbus Gas & Fuel Company v. Public Utilities Commission of Ohio, denied to the plaintiff in error due process of law and the equal protection of the laws, and confiscated its property, in violation of the Fourteenth Amendment to the federal Constitution; and the said decision is also in violation of the laws and Constitution of the State of Ohio.

[fol. 138] II

On Valuation of Property of Plaintiff in Error

3. Defendant in Error Made No Independent Valuation of Plaintiff in Error's Property—The defendant in

error made no independent valuation of its own of the property of the plaintiff in error, upon consideration of the evidence, but, in determining the alleged valuation of the property of the plaintiff in error, merely took an exhibit introduced in evidence by the plaintiff in error, setting forth, in numerous items, the valuation of its property, and, without any discussion or consideration of the evidence, arbitrarily struck from the valuation of the property of the plaintiff in error certain items and parts of items amounting to $218,049, and took the remainder as the rate base. The details of these deductions are hereinafter set forth.

4. Organization, or Preconstruction Costs—Although the testimony of the witnesses for the plaintiff in error shows that, in the reproduction of the property of the plaintiff in error, the cost of organization—sometimes in the testimony called preconstruction costs—would be $24,774, which testimony is uncontradicted and was given by witnesses whose competency and credibility are not questioned, the defendant in error, without any finding of fact or discussion of the testimony, arbitrarily struck said item out of the valuation of the property of the plaintiff in error and al-
[fol. 139] lowed nothing for that item of cost and value, and this court affirmed the said finding and order of the defendant in error. We respectfully submit that such action of the defendant in error and of this court constitutes an error of law, deprives the plaintiff in error of due process of law and the equal protection of the laws, and confiscate its property, in violation of the Fourteenth Amendment to the federal Constitution, and is also in violation of the laws and Constitution of the state of Ohio.

5. Working Capital—In its order of November 3, 1932, the defendant in error, in fixing the valuation of the property of the plaintiff in error used and useful for the convenience of the public, reduced the amount of working capital from $83,200, the amount established by the uncontradicted testimony of the witnesses for the plaintiff in error, whose competency and credibility are not questioned, to $61,880, which was declared by the defendant in error to be the "commission engineers' allowance for working capital" (Opinion, page 4). But the commission's engineers did not testify in the case, and there was no evidence

on which the commission did, or could, base the allowance which it made for working capital. It thus appears expressly and affirmatively that the defendant in error based its valuation of the property of the plaintiff in error, and its order under review in this case, upon information, or statements, or calculations, received from its own engineers which were not in any manner or form put in evidence and concerning which the plaintiff in error had no opportunity [fol. 140] to examine the said engineers. And this finding and order was affirmed by this court. This, we respectfully submit, is an error of law, and constitutes a denial to the plaintiff in error of due process of law and the equal protection of the laws, and confiscates its property, in violation of the Fourteenth Amendment to the federal Constitution, and is also in violation of the laws and Constitution of the state of Ohio.

6. Cost of Financing—(a) The defendant in error struck from the plaintiff in error's valuation of its properties used and useful in the public service cost of financing, $39,600, although that item of value was established by the uncontradicted testimony of several witnesses for the plaintiff in error, whose competency and credibility are not questioned, without any consideration or reference to the testimony; and this court, without any discussion of, or reference to, the testimony, affirmed the said findings and order of the defendant in error; and thereby the state of Ohio, through the said findings and order of the defendant in error and the said decision of this court, denied to the plaintiff in error due process of law and the equal protection of the laws, and confiscated its property, in violation of the Fourteenth Amendment to the federal Constitution; and said findings, order and decision are also in violation of the laws and Constitution of the state of Ohio.

(b) Cost of Financing under Ohio Public Utility Law—Although the public utility laws of Ohio, O. G. C., Section 499-9, paragraph G, expressly recognize the cost of financ- [fol. 141] ing as an item of the value of a utility's property, to wit, in the following language:

"If there shall be any additional value given to the value of the property of a public utility or railroad * * * for financing, such additional value shall be separately and

specifically set forth, together with the basis for the computation or estimate of such additional value."

and although the uncontradicted testimony of witnesses whose competency and credibility are not questioned showed that cost of financing is a necessary part of the reproductive cost of the property, and that there would be an additional value given to the value of the property of the plaintiff in error because of the cost of financing, and set forth the amount of such additional value, together with the basis of the computation or estimate of such additional value, nevertheless the defendant in error refused to include anything in the value of the property of the plaintiff in error for financing, and this court affirmed the findings and order of the defendant in error in so doing; and thereby the state of Ohio, through the findings and order of the defendant in error and the decision of this court, denied to the plaintiff in error due process of law and the equal protection of the laws, and confiscated the property of the plaintiff in error, in violation of the Fourteenth Amendment to the federal Constitution; and said findings, order and decision are also in violation of the laws and Constitution of the state of Ohio.

(c) Cost of Financing under Ohio Corporation Law—In direct disregard of the fact that the statutes of Ohio [fol. 142] expressly recognize services rendered in the sale or underwriting of the securities of a public utility, or other corporation, as an item or element of value for which it may lawfully issue its stock, to wit, O. G. C., Section 8623-16, which reads as follows:

"A corporation by action of its board of directors, subject to preemptive rights, if any, of shareholders, may also, for the purpose of marketing shares, issue and sell shares having par value at such a discount from the par value thereof, as would amount to or not exceed reasonable compensation, for the sale or underwriting of such shares, which discount shall be treated as cost of organization or financing,"

and in disregard of the uncontradicted testimony of competent and credible witnesses showing that such cost of financing would actually be incurred in the reconstruction or reproduction of the plant and property of the plaintiff

in error and the amount of such costs, the defendant in error, in fixing the alleged value of the property of the plaintiff in error, struck out of the valuation proved by the plaintiff in error the amount proved by the witnesses for cost of financing and allowed nothing whatever for that item or element of value, and this court affirmed said finding and order of the defendant in error; and thereby the state of Ohio, through the said finding and order of the defendant in error and decision of this court, denied to the plaintiff in error due process of law and the equal protection of the laws, and confiscated its property, in violation of the Fourteenth Amendment to the federal Constitution; and said findings, order and decision are also in violation of the laws and Constitution of the state of Ohio.

[fol. 143] 7. Going Concern Value—(a) Although the item of going concern value, $125,000, which was included in, and formed a part of, the valuation of its property used and useful in the public service introduced in evidence by the plaintiff in error was sustained by the uncontradicted testimony of several witnesses for the plaintiff in error whose competency and credibility are not questioned, nevertheless, the defendant in error, without any consideration of, or reference to, the testimony, arbitrarily struck from the valuation of the property of the plaintiff in error the said item of property value and allowed nothing therefor; and, without any discussion of, or reference to, the testimony, this court affirmed the said finding and order of the defendant in error; and thereby the state of Ohio, through the said findings and order of the defendant in error and the said decision of this court, denied to the plaintiff in error due process of law and the equal protection of the laws, and confiscated its property, in violation of the Fourteenth Amendment to the federal Constitution; and said findings, order and decision are also in violation of the laws and Constitution of the state of Ohio.

(b) In its opinion in the Columbus Gas & Fuel Company case this court said:

"The members of the commission were unanimous in the disallowance of going concern value as a separate item. * * * Similarly the Supreme Court of the United States in a recent case, Los Angeles Gas & Electric Corporation

v. Railroad Commission of California, supra, refused a going value claim of approximately nine million dollars. [fol. 144] "This court is of the opinion that in the instant case this refusal was proper." (Opinion, pages 14-15.)

This, it is respectfully submitted, shows a misunderstanding of the evidence in this case and the defendant in error's action thereon, and also a misinterpretation of the decision of the United States Supreme Court in Los Angeles Gas & Electric Corporation v. Railroad Commission of California. In the instant case the value of the property of the plaintiff in error, as determined by the defendant in error, is made up wholly of items and figures taken from exhibits submitted by, and the testimony of the witnesses for, the plaintiff in error, except as to a few items for which the defendant in error reduced the figures submitted by the witnesses for the plaintiff in error and included in its exhibits. The defendant in error added nothing to the items which it took from the testimony and exhibits of the plaintiff in error for going concern value, for the fact that the plaintiff in error is a going concern or for any similar element of value. The testimony of the witnesses for the plaintiff in error expressly shows that the items of value submitted by them which were accepted, either in whole or in part, by the defendant in error, contained nothing for going concern value, or for the fact that the plaintiff in error is a going concern, or for any other element of going concern value, or similar item of value, and that testimony is uncontradicted. The figures adopted by the defendant in error, therefore, included nothing for going concern value, or for the fact that the plaintiff in error is a going concern, or for any other similar item or [fol. 145] element of value, but represented merely the "bare bones" of the plant.

In the case of Los Angeles Gas & Electric Corporation v. Railroad Commission of California, cited and relied on by this court in this connection, the commission adopted as the primary basis of valuation the historical cost of the property, and, according to Mr. Chief Justice Hughes, this

"historical cost of the far greater part of the fixed property appears to have been taken at price levels which were higher than those which have obtained in the period to which the prescribed rates are applicable, and cannot fairly

be said to underestimate the value of the plant as of that period."

(In other words, the historical cost was greater than would have been the present reproduction cost at present prices.) In addition to the historical cost, the commission, in the Los Angeles case, allowed $5,500,000, concerning which the chief justice said:

"* * * this excess amount of over $5,500,000 can appropriately be assigned to elements of value which may not have been fully covered. The record affords no adequate basis for criticising the allowance made by the commission for materials and supplies and working capital, and thus the entire excess may be regarded as applicable to whatever intangible value the property had as a going concern. The fact that this margin in the rate base was not described as going value is unimportant, if the rate base was in fact large enough to embrace that element."

This language, when carefully considered, is capable of only one interpretation—that is, that, in the Los Angeles [fol. 146] Gas & Electric Corporation case, there was included in the value of the property as fixed by the commission and the courts, $5,500,000 for going concern value. That decision is no justification for the action of the defendant in error and court in this case. It is clearly implied in the decision in that case throughout—even in the majority opinion—that, unless such an allowance had been made, the action of the commission and court below would have been invalid as a violation of the Fourteenth Amendment to the federal Constitution. The controversy in that case was whether or not the action of the commission and lower court was invalid because the allowance was not specifically stated to be for going concern value when, as the United States Supreme Court found, it appeared to have been made for nothing else. This is very different from the case at bar, in which the figures adopted, under the express testimony of the witnesses, exclude any similar allowance. There is no pretense on behalf of the defendant in error that the figures adopted by it included, directly or indirectly, anything for going concern value, for the fact that the plaintiff in error is a going concern or for any other similar item or element of value. Nevertheless, this court affirmed the said findings and order of the defendant

in error; wherefore, the plaintiff in error submits that the state of Ohio, by the said findings and order of the defendant in error and the said decision of this court, denied to the plaintiff in error due process of law and the equal protection of the laws, and confiscated its property, in violation of the Fourteenth Amendment to the federal Constitution; and said findings, order and decision are also in [fol. 147] violation of the laws and Constitution of the State of Ohio.

8. On Undistributed Construction Expenditures During Construction—The defendant in error, without any discussion of, or reference to, the evidence, struck out of the valuation of its property submitted by the plaintiff in error undistributed construction expenditures during construction, amounting to $130,640, and substituted in lieu thereof "general overheads (14%), $99,045." The items and allowances for undistributed construction expenditures during construction, amounting to $130,640, which were struck out by the defendant in error, were supported by the uncontradicted testimony of witnesses for the plaintiff in error, whose competency and credibility are not questioned. No reason was given by the defendant in error for rejecting this testimony, or any part of it, and no reason was given for the defendant in error's adoption of $99,045 for general overheads, and it was based on no testimony in the case; and this action of the defendant in error was affirmed by this court. Wherefore, we respectfully submit that the state of Ohio, through the said findings and order of the defendant in error and the decision of this court, denied to the plaintiff in error due process of law and the equal protection of the laws, and confiscated its property, in violation of the Fourteenth Amendment to the federal Constitution; and said findings, order and decision are also in violation of the laws and Constitution of the state of Ohio.

9. Statutory Formula for Valuation—This court, in the sixth and seventh paragraphs of the syllabus in the case [fol. 148] of Columbus Gas & Fuel Company v. Public Utilities Commission of Ohio, referred to in this court's opinion in this case, held that:

"6. The General Assembly of the state of Ohio having provided a legislative formula for the Public Utilities Commission of Ohio, in ascertaining the value of the property of a public utility for the purpose of fixing a rate-base, such formula must be followed by the Public Utilities Commission, and a departure therefrom constitutes error.

"7. In ascertaining the value of the property of a public utility for the purpose of fixing a rate-base, the Public Utilities Commission of Ohio has no vestige of discretionary power."

The formula mentioned, as set forth in Ohio General Code, Section 499-9, provides the method of determining the value of all physical property other than land of a public utility as follows, to wit:

"D. The cost of new production as of a date certain, of all physical property other than land, owned and used by such public utility or railroad, showing the values of the separate items comprising such property, together with the unit basis of such valuation.

"E. Depreciation, if any, from the new reproductive cost as of a date certain, for existing mechanical deterioration, for age, for obsolescence, for lack of utility or for any other cause, the percentage and amount of each class of depreciation, if any, to be specifically set forth in detail.

"F. The net value as of a date certain, of all physical property other than land owned by such utility or railroad, to be derived by deducting the sum of the amounts of depreciation from the sum of the new reproductive costs."

[fol. 149] The said statute of Ohio, as construed by this court in the decision above mentioned, because it prescribes a formula for the valuation of the property of a public utility which excludes the consideration of any evidence or element of value, or fact indicating or determining value except the reproductive cost of said physical property other than land, less the accrued depreciation thereof, denies to the plaintiff in error due process of law and the equal protection of the laws, and confiscates its property, in violation of the Fourteenth Amendment to the federal Constitution.

The interpretation of the statutes of Ohio by this court

as hereinbefore set forth, had never been made prior to the decision by this court of the case of Columbus Gas & Fuel Company v. Public Utilities Commission of Ohio, hereinbefore mentioned, and this case, and, consequently, this question could not have been presented in the original error proceeding in this case.

10. Cost of Cutting and Restoring Paving.—The uncontradicted evidence shows that the cost of cutting and restoring paving in the new reproduction cost of Dayton company's gas distribution property as of the seventeenth day of July, 1929, the date certain, was $139,545.

This item was disallowed by the commission and this court in fixing the valuation of Dayton company's property upon which it must be allowed a fair and compensatory return.

Paragraphs D, E and F of Section 499-9, General Code, read thus in prescribing the rule for valuation:

"D. The cost of new production as of a date certain of all physical property, other than land, owned and used by such [fol. 150] public utility or railroad, showing the values of the separate items comprising such property, together with the unit basis of such valuation.

"E. Depreciation, if any, from the new reproduction cost as of a date certain, for existing mechanical deterioration, for age, for obsolescence, or for lack of utility or for any other cause, the percentage and amount of each class of depreciation, to be specifically set forth in detail.

"F. The net value as of a date certain, of all physical property other than land, owned by such utility or railroad, to be derived by deducting the sum of the amounts of depreciation from the sum of the new reproductive costs."

Section 499-13, General Code:

* * * "Whenever the authority is conferred or the obligation imposed by law upon the commission to ascertain the value of any public utility or railroad, such valuation under such authority or obligation shall be made in accordance with the provisions of this act."

The above quotations from the General Code are part of the Ohio act passed April 18, 1913, approved May 5, 1913,

and filed with the secretary of state May 10, 1913, a
became effective ninety days thereafter, to wit: August
1913.

It is apparent that the gas distribution system of Dayt
company in the eight towns concerned herein, cannot
reproduced without cutting and restoring the paving. Sa
should therefore have been included in the valuation
Dayton company's property and if it had been included th
the return to the company would have been much less th
6½% per year.

[fol. 151] The commission cited no authority in suppo
of its disallowance of this item.

The Supreme Court in support of its affirmance of t
commission as to this item cites Des Moines Gas Co. v. Ci
of Des Moines, 238 U. S., 153, and Newark Natural Gas
Fuel Company v. City of Newark, 92 O. S., 393.

The Des Moines case originated and came from Iow
where there was not at that time a statute similar to t
Ohio statutes quoted above, nor any statute regulati
public utilities, and we state this positively because we ha
examined the Iowa statutes.

The Newark case, 92 O. S., 393, cited by the Supre
Court in its opinion in the case at bar, arose upon
ordinance of Newark passed April 6, 1911, and while t
decision of the Supreme Court was rendered July 2, 191
this court could not have based its decision upon nor ha
considered the Ohio act which became effective August 1
1913. If that act had been effective when the Newark ca
arose we submit the decision of the Supreme Court wou
have been different.

We insist that under the Ohio statutes the cost of cuttin
and restoring paving should and necessarily must, be add
to the valuation of Dayton company's property. With th
addition the rates to which the company is remitted by th
order of the commission will not yield it a fair or re
sonable return on the value of its property under th
formula prescribed by the statutes of Ohio.

In the decision in the Columbus case this court said tha
the formula to guide the commission is laid down by th
[fol. 152] statutes and that the commission has no discre
tion in the matter of following that formula, and we subm
that this court must adhere to that formula, and this ce
tainly requires that in estimating the reproduction cost ne

of a gas distribution property the cost of cutting and replacing paving must be included.

The commission and court may not think this formula right, but it is not for those bodies to change it; such a change can be made only by the Legislature. We must take and apply the statutes as we find them.

This court should not ruthlessly disregard a requirement of the statute as it has done in not allowing as an element of the reproduction cost of a gas distribution system the cost of cutting and replacing paving.

People, ex rel. v. Willcox, 210 N. Y., 479, decided in 1914, is not an authority in Ohio for disallowing as an element of the rate base the cost of cutting and replacing paving, because the New York statute (7 Birdseye, Section 72, pages 870 and 871) at that time required the capital actually expended to be considered, whereas the Ohio statute pays no attention to the amount of expenditure, but only to the reproduction cost new as of a date certain, less depreciation.

Wherefore we respectfully submit that the state of Ohio, by the construction of said statute, the said order and findings of the defendant in error, and the said decision of this court, denied to the plaintiff in error due process of law and the equal protection of the laws, and confiscated the property of the plaintiff in error, in violation of the Fourteenth Amendment to the federal Constitution.

[fol. 153] The interpretation of the statutes of Ohio by this court, as hereinbefore set forth, had never been made prior to the decision by this court of the case of Columbus Gas & Fuel Company v. Public Utilities Commission of Ohio, hereinbefore mentioned, and this case, and, consequently, this question could not have been presented in the original error proceeding in this case.

11. Rate of Return—The effective date of the schedule of rates of the plaintiff in error in controversy in this case was July 17, 1929, and the rate of return fixed by the defendant in error relates back to and becomes effective as of that date. The uncontradicted testimony of witnesses for the plaintiff in error whose competency and credibility were not questioned established a necessary rate of return of at least 8%. There was no evidence that 6.5% or anything less than 8%, would be a reasonable rate of return; in fact, the defendant in error, in its opinion and report accompanying its finding and order in the case of Columbus

Gas & Fuel Company v. Public Utilities Commission of Ohio, which finding and order are made a part of the findings and report in this case, expressly admitted:

* * * "in prosperous times 7 and 8 per cent., and even more were allowed," "a gas company is a more hazardous undertaking than other utilities," "and therefore it might be justly said that such a company would be entitled to a greater rate because of the greater risk involved."

It will be observed that there was no finding or determination that 6.5% was a fair or reasonable rate of return a [fol. 154] of July 17, 1929, or at any other time, except the "present"—that is, November 8, 1932, the date of the defendant in error's final order. It thus appears that the rate of return of 6.5% was adopted by the defendant in error because, and only because, of the extraordinary business depression which existed at the time of the said finding and order of the defendant in error. It is a matter of which the court will take judicial notice, that this business depression did not exist at the effective date of the schedule of rates in question—that is, July 17, 1929—and that that period was an especially "prosperous" time, when, according to the defendant in error's explicit statement, returns of "7 and 8 per cent., and even more were allowed."

Nevertheless, the defendant in error fixed a rate of return in this case of 6.5% and, without any discussion of, or reference to, the evidence, this court affirmed the said finding and order. Wherefore, the state of Ohio, by the said findings and order of the defendant in error and the decision of this court, denies to the plaintiff in error due process of law and the equal protection of the laws, and confiscates the property of the plaintiff in error, in violation of the Fourteenth Amendment to the federal Constitution; and said finding, order and decision are also in violation of the laws and Constitution of the state of Ohio.

12. Refund—Because the order of the defendant in error which was affirmed by this court requires the plaintiff in error to refund to consumers a large amount of money [fol. 155] to wit, approximately, $300,000, the order of the defendant in error under review, and the decision of this

court, take not merely the use of the property of the plaintiff in error, without just and reasonable compensation for such use, but directly take the amount which the plaintiff in error is ordered to refund, in violation of the Fourteenth Amendment to the federal Constitution.

III

On Operating Expenses of Plaintiff in Error

13. (a) On Failure to Allow Proper Annual Depreciation—The defendant in error, in the findings and order under review in this case, allowed only 2% for annual depreciation, whereas the uncontradicted evidence of the witnesses for plaintiff in error, whose competency and credibility were not questioned, showed that the annual allowance for depreciation should have been not less than 4%, and this court affirmed said finding and order of the defendant in error. We respectfully submit that the action of the defendant in error, and of this court, in ignoring the testimony of the plaintiff in error on this point, and fixing an allowance which was sustained by no evidence, was an error of law and amounts to a denial to the plaintiff in error of due process of law and the equal protection of the laws, and confiscates its property, in violation of the Fourteenth Amendment to the federal Constitution, as well as being [fol. 156] in violation of the laws and Constitution of the state of Ohio.

(b) The defendant in error, in its findings and order under review in this case, refused to allow depreciation on general overheads applicable to those items of property which are depreciated in the valuation, and this court affirmed said finding and order of the defendant in error, although the uncontradicted testimony of witnesses for the plaintiff in error, whose competency and credibility were not questioned, showed that a proper allowance for depreciation of such overheads should be made, and the amount thereof. We respectfully submit that the action of the defendant in error, and of this court, in ignoring the testimony of the plaintiff in error on this point, and fixing an allowance which was sustained by no evidence, was an error of law and amounts to a denial to the plaintiff in error of due process of law and the equal protection of the laws, and confiscates its property, in violation of the Fourteenth

Amendment to the federal Constitution, as well as being in violation of the laws and Constitution of the state of Ohio.

14. Amortization—This court in its decision of the case of Columbus Gas & Fuel Company v. Public Utilities Commission of Ohio, in paragraph 8 of the syllabus, makes the following determination of law:

"8. The laws of Ohio make no provision for amortization, and the Public Utilities Commission of Ohio is without authority to take it into consideration in the ascertainment of values in fixing a rate-base."

[fol. 157] In the instant case, no claim was made that the Public Utilities Commission of Ohio has authority to take amortization into consideration in the ascertainment of values in fixing a rate base, and no such question, either of fact or law, was involved in the case. The question of a proper allowance for amortization for certain properties of the Ohio Fuel Gas Company, from which the plaintiff in error purchases its supply of gas, and also of the United Fuel Gas Company, from which the Ohio Fuel Gas Company purchases gas, in the determination of the fairness of the contract price paid by the plaintiff in error to the Ohio Fuel Gas Company, as a part of the operating expenses of the plaintiff in error, was involved in this case; and the said decision of this court is a denial to the plaintiff in error of due process of law and the equal protection of the laws, and confiscates the property of the plaintiff in error, in violation of the Fourteenth Amendment to the federal Constitution; and the said statute of Ohio, as so interpreted by this court, violates the said Fourteenth Amendment.

The interpretation of the statutes of Ohio by this court, as hereinbefore set forth, had never been made prior to the decision by this court of the case of Columbus Gas & Fuel Company v. Public Utilities Commission of Ohio, hereinbefore mentioned, and this case, and, consequently, this question could not have been presented in the original error proceeding in this case.

15. On Failure to Make Proper Allowance for Taxes in Operating Expenses—The defendant in error failed to

make proper allowance to the plaintiff in error for taxes, in the following particulars, to wit:

[fol. 158] (1) Defendant in error failed to make proper allowance for the increased income tax which the plaintiff in error must pay the United States under the act of Congress passed in June, 1932;

(2) Defendant in error used 1.35% as the rate to the allowed plaintiff in error for excise taxes, whereas the excise tax rate in effect at the time of the finding and order of November 3, 1932, was, and for some time to come will be, 2.35%;

(3) Defendant in error erred in its computation of the public utility tax to be paid by the plaintiff in error on account of the eight towns;

And this court affirmed the findings and order of the commission in these particulars. Wherefore, the said findings and order of the defendant in error and the decision of this court deny to the plaintiff in error due process of law and the equal protection of the laws, and confiscate its property, in violation of the Fourteenth Amendment to the federal Constitution, as well as being in violation of the laws and Constitution of the state of Ohio.

16. On the Contract Price of Gas—The defendant in error, in the findings and order here under review, fixed the price of natural gas which the plaintiff in error shall be allowed to pay the Ohio Fuel Gas Company for natural gas at the gateways of the towns at 39 cents per thousand cubic feet, instead of 45 cents, the price which the plaintiff in error is obligated to pay under its contracts with the Ohio Fuel Gas Company, and this court affirmed said finding and order of said defendant in error, and in so doing de- [fol. 159] fendant in error and this court committed the following errors:

(1) The defendant in error disregarded the contracts between the plaintiff in error and the Ohio Fuel Gas Company fixing the price of gas at the gateways at 45 cents per thousand, without any finding of fact or evidence that the said contracts were fraudulent or void or entered into in bad faith, or that they unduly favored the Ohio Fuel Gas Company or were not advantageous to the plaintiff in error, or that the plaintiff in error could obtain a supply of gas

otherwise at a lower price or on better terms, or that t
execution of said contracts was brought about by reas
of the ownership, directly or indirectly, by the Columb
Gas & Electric Corporation of the voting stock of the plai
tiff in error and all the stock of the said Ohio Fuel G
Company. Said finding and order of the defendant
error and the affirmance thereof by this court are inco
sistent with the specific finding or statement by the defen
ant in error in its order of November 21, 1930, that sa
contracts were not "void or a sham or fraudulent
Wherefore, the plaintiff in error submits that the said fin
ing and order of the defendant in error and the decisi
of this court denied to the plaintiff in error due process
law and the equal protection of the laws, and confiscat
its property, in violation of the Fourteenth Amendment
the federal Constitution, and also in violation of Sec. 1
Article I of said Constitution, and the said finding, ord
and decision were also in violation of the laws and Co
stitution of the state of Ohio.

[fol. 160] (2) Defendant in error, in its finding and ord
fixing the price which the plaintiff in error should be pe
mitted to charge in its operating expenses for gas pu
chased from the Ohio Fuel Gas Comany at 39 cents p
thousand cubic feet instead of 45 cents, the contract pric
ignored the uncontradicted testimony of witnesses for t
plaintiff in error, whose competency and credibility are n
questioned, that 45 cents per thousand was the price co
monly paid for natural gas under similar circumstanc
and conditions and, in effect, was the fair market pri
thereof, and this court affirmed the said finding and ord
of the defendant in error. Wherefore, the plaintiff in err
submits that the said finding and order of the defendant
error and the decision of this court denied to the plainti
in error due process of law and the protection of the law
and confiscated its property, in violation of the Fourteen
Amendment to the federal Constitution, and also in viol
tion of Section 10, Article I of said Constitution, and t
said finding, order and decision were also in violation
the laws and Constitution of the state of Ohio.

(3) The defendant in error made its determination th
39 cents per thousand was the fair and reasonable price
be paid by the plaintiff in error to the Ohio Fuel Gas Co

pany for gas in the same manner as if the Ohio Fuel Gas Company were a public utility and the gas in question were furnished to the plaintiff in error in the performance of a duty of the Ohio Fuel Gas Company as a public utility; whereas under the laws of Ohio, the Ohio Fuel Gas Com- [fol. 161] pany, in supplying gas to the plaintiff in error for distribution to the customers of the plaintiff in error, was not functioning as a public utility; and this court, affirmed the said finding and order of the defendant in error. Wherefore, the plaintiff in error submits that the said finding and order of the defendant in error and the decision of this court denied to the plaintiff in error due process of law and the equal protection of the laws, and confiscated its property, in violation of the Fourteenth Amendment to the federal Constitution, and also in violation of Section 10, Article I, of said Constitution, and the said finding, order and decision were also in violation of the laws and Constitution of the state of Ohio.

(4) In the determination of the reasonableness of the price paid by the plaintiff in error to the Ohio Fuel Gas Company for gas purchased under the aforesaid contracts, the defendant in error valued the producing natural gas leaseholds, known in this case as No. 1 leaseholds, at $25.00 per acre, although the testimony of the witnesses in the case showed that the general market value of said leaseholds was greatly in excess of $25.00 per acre; and this court, in the case of City of Columbus v. Public Utilities Commission of Ohio, No. 23864, reversed the said finding of the defendant in error and held that said leaseholds could be included in the valuation of the property of the Ohio Fuel Gas Company at the book value thereof. Wherefore, the plaintiff in error submits that the said finding and order of the defendant in error and the decision of this court denied to the plaintiff in error due process of law [fol. 162] and the equal protection of the laws, and confiscated its property, in violation of the Fourteenth Amendment to the federal Constitution, and also in violation of Section 10, Article I, of said Constitution, and the said finding, order and decision were also in violation of the laws and Constitution of the state of Ohio. (This point is hereinafter more fully set forth.)

(5) In the determination of the reasonableness of the price paid by the plaintiff in error to the Ohio Fuel Gas

Company for gas purchased under the aforesaid contracts, the defendant in error held that only such portion of the operated natural gas leaseholds of the said Ohio Fuel Gas Company as were included in Class No. 1 were used and useful for the convenience of the public and that only leases of that class could be valued and the value thereof be included in the rate base, so-called, of the Ohio Fuel Gas Company, and said finding and order of the defendant in error were affirmed by this court, although the uncontradicted testimony of witnesses for the Columbus Gas & Fuel Company, whose testimony was introduced by stipulation in this case on behalf of the plaintiff in error herein, showed that all of the leaseholds of Class No. 2, all of the leaseholds of Class No. 3, and all of the leaseholds of Class No. 4, were used and useful for the convenience of the public, and, except for the ownership of such leaseholds, the Ohio Fuel Gas Company could not have been formed and organized and could not exist. Wherefore, the plaintiff in error submits that the said finding and order of the defendant in error and the decision of this court denied to the [fol. 163] plaintiff in error due process of law and the equal protection of the laws, and confiscated its property, in violation of the Fourteenth Amendment to the federal Constitution, and also in violation of Section 10, Article I, of said Constitution, and the said finding, order and decision were also in violation of the laws and Constitution of the state of Ohio.

(6) In determining the reasonableness of the price to be paid by the plaintiff in error to the Ohio Fuel Gas Company for gas, the defendant in error refused to include in the operating expenses of the Ohio Fuel Gas Company the delay rentals paid for carrying the leaseholds of the classes known in these proceedings as No. 2, No. 3 and No. 4, and this court affirmed said finding and order of the defendant in error, although the testimony of witnesses for the Columbus Gas & Fuel Company, which was introduced by stipulation in this case, shows that it is the universal practice of natural gas utilities to include such delay rentals in the operating expenses thereof and that, unless such reserve acreage is held and the delay rentals thereof paid as operating expenses, companies such as the Ohio Fuel Gas Company could not be created or exist. Wherefore, the plaintiff in error submits that the said finding and

order of the defendant in error and the decision of this court denied to the plaintiff in error due process of law and the equal protection of the laws, and confiscated its property, in violation of the Fourteenth Amendment to the federal Constitution, and also in violation of Section 10, Article I, of said Constitution, and the said finding, order and [fol. 164] decision were also in violation of the laws and Constitution of the state of Ohio.

Plaintiff in error submits that each and all of the rulings set forth in the preceding paragraphs (1) to (6) were errors of law, which, through the consequent reduction in the price which the plaintiff in error is allowed to include in its operating expenses for gas purchased from the Ohio Fuel Gas Company, results, through the order of refund and otherwise, directly and immediately, in the taking of the property of the plaintiff in error without due process of law, denies to the plaintiff in error the equal protection of the laws, and confiscates its property, contrary to the Fourteenth Amendment to the federal Constitution; and also in violation of Section 10 of Article I of said Constitution; and said findings, order and decision are also in violation of the laws and Constitution of the state of Ohio.

17. Further on Valuation of No. 1 Leaseholds—(a) The holding and decision of this court, to wit:

"we hold that the value of class No. 1 leases should be reduced to book value, and reduced to the book value of class No. 1 leases alone" (Opinion, page 14).

denies to the Ohio Fuel Gas Company the right to earn a return upon the present fair value of its property, to wit, its gas producing leaseholds actually used and useful in the public service, and through the consequent reduction in the price which the plaintiff in error is allowed to include in its operating expenses for gas purchased from the Ohio Fuel Gas Company, results, through the order of refund and otherwise, directly and immediately, in the taking of the property of the plaintiff in error without due process [fol. 165] of law, denies to the plaintiff in error the equal protection of the laws, and confiscates its property, contrary to the Fourteenth Amendment to the federal Constitution and also violates Section 10 of Article I of said Constitution.

The finding and order of the defendant in error here under review, and the decision of this court, deny to the Ohio Fuel Gas Company any and all benefit and advantage accruing from the discovery of gas upon the lands and premises which it holds under lease and in effect gives to the consumers of gas, the rate payers, absolutely all the benefit and advantage resulting therefrom. For illustration, the Ohio Fuel Gas Company has a certain lease for which, years ago, it paid the nominal sum of $1.00. It drills a well upon said leasehold and obtains gas in very large quantities, say ten million cubic feet a day. Every informed person knows that such a tract of land is, in fact, very valuable, either for use in the public service or outside it. Under the decision of this court that the company is entitled to earn a return only on the book value of its leaseholds, the Ohio Fuel Gas Company would be entitled to earn (at the rate of 6½% adopted by the defendant in error and affirmed by this court) 6½¢ a year for all of the gas produced from said leasehold, no matter how great the quantity of gas might be. This would be a farce, if it were not a tragedy.

(b) The holding and decision of this court, to wit:

"we hold that the value of class No. 1 leases should be reduced to book value, and reduced to the book value of class No. 1 leases alone" (Opinion, page 14),

ignores the fact that the books of a natural gas utility do [fol. 166] not purport to show the "value" of its leaseholds, but only the cost thereof. This is because of the fact that, under "a uniform classification of accounts for natural gas utilities prescribed by the Public Utilities Commission of the state of Ohio, effective January 1, 1921," a natural gas utility is required to enter in its fixed capital accounts only the "first cost to the utility" of its natural gas leaseholds and natural gas rights. The pertinent requirements of said classification of accounts are the following:

"205. Leaseholds.

"Charge to this account the first cost to the utility of acquiring leaseholds of land, structures, or equipment used by the utility in the production of natural gas.

"Exclude from this account the cost of leaseholds which terminate in one year or less after they become effective. Exclude also rents paid periodically for rights obtained under leases.

"In this classification this account represents interests in land and as such should be amortized during the lives of the leaseholds.

"207. Natural Gas Rights.

"Charge to this account the first cost to the utility of purchasing natural gas rights. This account is intended to provide for the cost to the utility of obtaining ownership in gas underlying land not owned or leased by the utility. It does not provide for gas rights which are leased and which are properly chargeable to 205. Leaseholds' account.

"In this classification this account represents interests in land and if the rights charged hereto are limited in life should be amortized during the lives of the rights."

[fol. 167] Under said rules of accounting, which were adopted by the defendant in error pursuant to statutory authority, the fixed capital accounts of leaseholds and natural gas rights contain only the first cost of said properties to the utility, which, in practically all instances, means the cost before the development or discovery of gas thereon, or in the vicinity thereof, and include nothing whatever for the value inhering in such properties by reason of the discovery and development of gas thereon, or in the vicinity thereof, which gives them the values to which the witnesses for the plaintiff in error testified. The adoption of the mere first cost of said leaseholds in lieu of the present value thereof is arbitrary, unlawful and unreasonable, and, because of the arbitrary, unreasonable and unlawful use of such cost in lieu of the present value of said leaseholds in the determination of the reasonableness of the price paid by the plaintiff in error to the Ohio Fuel Gas Company for gas and the resultant holding by the defendant in error that such gate price is unfair and unreasonable and must be reduced, and, in consequence thereof, the order of the defendant in error, affirmed by this court, that the plaintiff in error shall refund to consumers all of the money collected by it under the schedule in controversy in excess of the rates fixed by the defendant in error and af-

firmed by this court in this case, amounting to approximately $300,000, denies to the plaintiff in error due process of law and the equal protection of the laws, and confiscates the property of the plaintiff in error, in violation of the Fourteenth Amendment to the federal Constitution, and [fol. 168] also in violation of Section 10, Article I, of said Constitution and is also in violation of the laws and Constitution of the state of Ohio.

18. Court Directed Valuation of Leaseholds Contrary to Statutory Formula.—In the Columbus Gas & Fuel Company case, this court held:

"6. The General Assembly of the state of Ohio having provided a legislative formula for the Public Utilities Commission of Ohio, in ascertaining the value of the property of a public utility for the purpose of fixing a rate-base, such formula must be followed by the Public Utilities Commission, and a departure therefrom constitutes error.

"7. In ascertaining the value of the property of a public utility for the purpose of fixing a rate-base, the Public Utilities Commission of Ohio has no vestige of discretionary power."

Regardless of the above explicit holdings of this court, and regardless of the fact that the statutory formula for the valuation of the property of a public utility, as declared by this court, makes no provision for the valuation of any part of the property of a public utility on the basis of the "book value" thereof, and that no statute of the state of Ohio provides for the valuation of the property of a public utility on the basis of the cost, or value, thereof, as reflected by the books *by* the utility, this court reversed the defendant in error for placing upon the No. 1 leaseholds of the Ohio Fuel Gas Company what it regarded as the present value thereof, and explicitly directed and held that the said leaseholds could be valued only at the "book value" thereof. We respectfullly submit that said action and de- [fol. 169] cision of this court, because the valuation of the leaseholds of the Ohio Fuel Gas Company enters into the determination of the fairness of the contract price of gas paid by the plaintiff in error to the Ohio Fuel Gas Company and thus affects the operating expenses of the plaintiff in error and bears directly upon the reasonableness of the

rates of the plaintiff in error and upon the order of refund in this case, denies to the plaintiff in error due process of law and the equal protection of the laws, and confiscates the property of the plaintiff in error, in violation of the Fourteenth Amendment to the federal Constitution and is also in violation of Section 10, Article I, of said Constitution.

19. On Court's Conclusion that There is No Market for Gas Leaseholds—There is no evidence to sustain the court's conclusion or statement that,

"No valuation can be based upon market price because of the fact that there is no market for a gas property so extensive as that of the Ohio Fuel Gas Company" (Opinion, page 12),

and, therefore, the said finding and conclusion is arbitrary, unreasonable and unlawful, and, through the reduction in the price which the plaintiff in error is allowed to include in its operating expenses for gas purchased from the Ohio Fuel Gas Company results, through the order of refund and otherwise, directly and immediately in the taking of the property of the plaintiff in error without due process of law, denies to the plaintiff in error the equal protection of the laws, and confiscates its property, in violation of the Fourteenth Amendment to the federal Constitution, and [fol. 170] also violates Section 10, Article I, of said Constitution, as well as being in violation of the laws and Constitution of Ohio.

Courts and commissions of other states find no difficulty in adopting identically the same kind of testimony as to the value of natural gas leaseholds. Only recently, the Public Service Commission of West Virginia, in City of Wheeling v. Natural Gas Company of West Virginia, Bulletin No. 135 of Public Service Commission of West Virginia, decided May 25, 1933, after an elaborate review of the authorities in that state on the subject, fixed the value of the leaseholds involved in that case on identically the same kind of testimony that was introduced in this case, and included unoperated (Classes 2, 3 and 4), as well as operated, leaseholds in the valuation. In Pennsylvania, the Public Service Commission of that state, in Grove City, et al. v. Union Heat & Light Company, 19 Pa. Dept. Reports, 437, decided

February 28, 1933, a small case, valued the natural gas leaseholds involved therein on identically the same kind of testimony that was introduced in the case under consideration and included unoperated, as well as operated, leaseholds in the valuation. Again, the Pennsylvania Public Service Commission, in Erie, et al. v. Pennsylvania Gas Company, which has been pending in the courts and commission since 1917, rendered a decision on April 4, 1933, following the decision of the Pennsylvania Supreme Court in Erie v. Public Service Commission (Pennsylvania Gas Company v. Public Service Commission), 278 Pa. St., 512, [fol. 171] adopted identically the same kind of testimony that was introduced in this case as establishing the value of the gas producing properties therein involved. (These two decisions of the Pennsylvania Public Service Commission are final, as no appeals were taken and the time for appeal has exp') The same kind of testimony has been adopted by th nnsylvania Public Service Commission in several other cases (see page 138 of brief of plaintiff in error in this case). In the state of New York, the Public Service Commission approved the same character of testimony (Davis, et al. v. Pennsylvania Gas Company, P. U. R., 1921B, 342, 357), and said testimony was also approved by the Appellate Division of the Supreme Court of New York, Third Department, to which appeals from the Public Service Commission are taken under the laws of that state (People, ex rel. v. Public Service Commission, 198 N. Y. S., 193; Pennsylvania Gas Company v. Public Service Commission, 207 N. Y. S., 599, 605, 606, 608).

Even if it could properly be said that no market exists for the large amount of gas leaseholds owned by the Ohio Fuel Gas Company, that would not relieve the defendant in error from its duty of determining the value of said leaseholds. Under the law of this state as well as under the federal Constitution, a natural gas utility is entitled to a reasonable return upon the present fair value of its property used and useful for the convenience of the public, and that necessarily includes gas producing properties as well as all other kinds of property. A natural gas utility cannot be denied a fair return upon the value of its property [fol. 172] used in the public service merely because of difficulty in determining that value. As expressly held by this

court in Rhodes v. Baird, 16 O. S. 573, which involved the valuation of a lease for a term of years,

"If it had no general market value, its value should be ascertained from witnesses whose skill and experience enabled them to testify directly to such value in view of the hazards and chances of the business to which the land was to be devoted." (Syllabus.)

Under the doctrine just quoted, which states the settled general law, the opinions of witnesses as to the value of the leaseholds were competent evidence, even if it could be said that the general market value could not be established because, under the peculiar circumstances of the case, no general market existed for the properties.

20. On Accrued Depreciation of Gas Well Construction and Gas Well Equipment—In determining the value of certain property of the Ohio Fuel Gas Company, to wit, gas well construction and gas well equipment, the defendant in error deducted from the reproductive cost new of said property an amount for accrued depreciation which represents the ratio of the amount of gas produced from said wells to the estimated total amount of gas which has been produced and shall hereafter be produced from said wells. This method of depreciating said properties is purely theoretical and has no actual relation to the present value thereof. It does not comply with the statutory provision, O. G. C., Section 499-9, which describes the depre- [fol. 173] ciation to be deducted from the reproductive cost new in the following language:

"E. Depreciation, if any, from the new reproductive cost as of a date certain, for existing mechanical deterioration, for age, for obsolescence, for lack of utility or for any other cause, the percentage and amount of each class of depreciation, if any, to be specifically set forth in detail."

The theory and method of determining accrued depreciation of gas well construction and gas well equipment, accounts 211 and 212, adopted and used by the defendant in error results in deducting from the reproductive cost new of said properties approximately $10,000,000 more than the actual accrued depreciation thereof, as established by the testimony of the company. It is respectfully sub-

mitted that the alleged accrued depreciation of said gas well construction and gas well equipment accounts, and the properties therein, does not represent the results of any "mechanical deterioration, or age, or obsolescence, or lack of utility, or any other cause." In making said determination of the alleged accrued depreciation of said properties, the defendant in error declined to adopt the testimony of witnesses for the company showing the actual accrued depreciation thereof. It is respectfully submitted that the adoption and use by the defendant in error of the said theoretical method of determining accrued depreciation of said properties constituted an error of law, and, through the reduction in the amount allowed the plaintiff in error as operating expenses for the purchase of gas, the order [fol. 174] of refund, etc., denies to the plaintiff in error due process of law and the equal protection of the laws, and confiscates its property, in violation of the Fourteenth Amendment to the federal Constitution, and also in violation of Section 10, Article I, of said Constitution and is also in violation of the laws and Constitution of the State of Ohio.

21. On Reasonableness of Price Paid by Ohio Fuel Gas Company to United Fuel Gas Company for Gas—In determining the fairness and reasonableness of the price paid by the plaintiff in error to the Ohio Fuel Gas Company for gas, which, as treated by the defendant in error, involved the reasonableness of the price paid by the Ohio Fuel Gas Company to the United Fuel Gas Company for gas transported from the state of West Virginia and delivered at the Ohio river, the court failed to consider and make due allowance for the following pertinent facts:

The only way in which the fairness and reasonableness of the price paid by the defendant in error to the Ohio Fuel Gas Company and the price paid by the Ohio Fuel Gas Company to the United Fuel Gas Company, for gas, are involved in this proceeding is because of the common ownership, directly or indirectly, by the Columbia Gas & Electric Corporation of the stock of said Ohio Fuel Gas Company and United Fuel Gas Company and the voting stock of the plaintiff in error:

The United Fuel Gas Company is a corporation organized and existing under the laws of West Virginia, and serves gas as a public utility to consumers in that state;

[fol. 175] The gas sold by the United Fuel Company to the Ohio Fuel Gas Company is produced in the state of West Virginia.

Under the laws of West Virginia pertinent to the determination of the reasonableness of rates for natural gas supplied in the public service, as applied by the Public Service Commission and the courts of that state in natural gas rate cases, all of the gas leaseholds owned by the utility are valued and the value thereof included in the rate base and all the delay rentals, or carrying charges, of unoperated leases, as well as the rents and royalties payable on operated leases, are included in the operating expenses of the utility, and, under the laws of West Virginia, as applied by the Public Service Commission and the courts of that state in rate cases, the United Fuel Gas Company, in the determination of the fairness and reasonableness of the rates which it charges for natural gas would be entitled to have all the natural gas leaseholds owned by it valued at their present value and the value thereof included in the rate base, and also entitled to have all the delay rentals on unoperated leases, as well as the rents and royalties on operated leases, included in its operating expenses.

The defendant in error in the determination of the value of the property of the United Fuel Gas Company, the operating expenses of said company, etc., committed the same errors as hereinbefore complained of in its valuation of the properties of the Ohio Fuel Gas Company the determination of the operating expenses of said company, etc.

[fol. 176] Wherefore the plaintiff in error respectfully submits that the said action of the defendant in error, which was affirmed by this court, was unreasonable and unlawful, and, by reason of its effect on the amount allowed the plaintiff in error for operating expenses, the reasonableness of the schedule of rates in controversy in this case and the order of refund, denied to the plaintiff in error due process of law and the equal protection of the laws, and confiscated its property, in violation of the Fourteenth Amendment to the federal Constitution, and also constituted a violation of Section 10 of Article I of the said Constitution.

22. On Rate of Return Allowed Ohio Fuel Gas Company and United Fuel Gas Company.—In determining the cost

to the Ohio Fuel Gas Company of the gas which it supplies to the plaintiff in error, which includes the cost to the United Fuel Gas Company of the gas which it supplies to the Ohio Fuel Gas Company, as bearing on the reasonableness of the price which the plaintiff in error pays the Ohio Fuel Gas Company for gas, the defendant in error allowed to the Ohio Fuel Gas Company and to the United Fuel Gas Company a rate of return of only 6.5%, although the weight of the competent and credible testimony showed that a return of at least 8% was necessary, and this court affirmed the said finding and order of the defendant in error. We respectfully submit that said finding and order of the defendant in error and said decision of this court are in violation of the laws and Constitution of the state of Ohio.

[fol. 177] IV

Court Did Not Exercise Its Own Independent Judgment

This court, in reviewing the findings and order of the defendant in error, has given no consideration whatever to the weight of the testimony and has failed and refused to exercise its own independent judgment in the determination of vital questions of fact, and has thus denied to the plaintiff in error the kind of a review of the findings and order of the defendant in error to which it is entitled under the Fourteenth Amendment to the federal Constitution and decisions of the United States Supreme Court and of this court. (Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287, 64 L. ed. 908, 40 Sup. Ct. Rep. 527, P. U. R., 1920E, 814; Ohio Utilities Co. v. Public Utilities Commission, 267 U. S., 359, 69 L. ed. 656, 45 Sup. Ct. Rep., 259, P. U. R., 1925C, 599; H. V. Ry. Co. v. Pub. Util. Comm., 100 O. S., 321; Lykins v. Pub. Util. Comm., 115 O. S., 376.)

[fols. 178-180] V

Because of Other Errors Manifest of Record

Wherefore, the plaintiff in error prays that a rehearing be granted, that the decision heretofore rendered affirming the findings and order of the defendant in error be set aside and vacated, that judgment be rendered reversing

the findings and order of the defendant in error and entered in favor of the plaintiff in error.

Respectfully submitted, Edwin P. Matthews, John E. Mullin, Chester J. Gerkin, Charles P. Pfarrer, Attorneys for Plaintiff in Error.

July 19, 1933.

[fol. 181] State of Ohio

Office of Clerk of Supreme Court, Columbus

September 20, 1933.

23893

THE DAYTON POWER & LIGHT CO.

vs.

THE PUBLIC UTILITIES COMMISSION

Mr. E. P. Matthews, Dayton; Mr. John W. Bricker, Columbus, Ohio.

GENTLEMEN: I am directed by the Supreme Court to notify counsel in the above entitled cause that the Court has considered the application for rehearing filed therein and that a rehearing is denied.

Yours very truly, Seba H. Miller, Clerk.

[fol. 182] IN SUPREME COURT OF OHIO

[Title omitted]

ORDER DENYING REHEARING—September 20, 1933

"It is ordered by the Court that rehearings herein be, and the same hereby are denied."

[fol. 183] BEFORE PUBLIC UTILITIES COMMISSION OF OHIO

GAS RATES

Dayton District

Rates in effect immediately prior to July 17, 1929	Proposed rates filed June 17, 1929
North Hampton, Ohio and territory contiguous and adjacent thereto:	
$1.00 for the first five hundred (500) cubic feet or less, or none, of gas consumed each month.	One (1) dollar for the first 500 cubic feet of gas per month.
Fifty (50) cents per thousand (1,000) cubic feet for all over five hundred (500) cubic feet of gas consumed each month, with an additional charge of five (5) cents per thousand (1,000) cubic feet where bills are not paid on or before the tenth of the month following the month in which service is rendered.	Sixty (60) cents per 1,000 cubic feet of gas for the next 19,500 cubic feet per month.
	Fifty-five (55) cents per 1,000 cubic feet of gas for all over 20,000 cubic feet per month.

Piqua District

Piqua, Ohio:	
$1.00 for the first five hundred (500) cubic feet or less of gas consumed each month.	One (1) dollar for the first 500 cubic feet of gas per month.
Fifty (50) cents per thousand (1,000) cubic feet for all over five hundred (500) cubic feet of gas consumed each month, with an additional charge of five (5) cents per thousand (1,000) cubic feet where bills are not paid on or before the tenth of the month following the month in which service is rendered.	Sixty (60) cents per 1,000 cubic feet of gas for the next 19,500 cubic feet per month.
	Fifty-five (55) cents per 1,000 cubic feet of gas for all over 20,000 cubic feet per month.

Sidney, Ohio:	
$1.00 for the first 500 cubic feet or less of gas consumed each month, and	One (1) dollar for the first 500 cubic feet of gas per month.
50¢ per 1,000 cubic feet for all gas consumed in excess of the first 500 cubic feet, with an additional charge of 5¢ per thousand cubic feet if bills are not paid on or before the 10th of the month following that in which said gas was consumed.	Sixty (60) cents per 1,000 cubic feet of gas for the next 19,500 cubic feet per month. Fifty-five (55) cents per 1,000 cubic feet of gas for all over 20,000 cubic feet per month.
Tippecanoe City, Ohio:	
$1.00 for the first 500 cubic feet or less of gas consumed each month, and	One (1) dollar for the first 500 cubic feet of gas per month.
50¢ per 1,000 cubic feet for all gas consumed in excess of the first 500 cubic feet, with an additional charge of 5¢ per 1,000 cubic feet if bills are not paid on or before the 10th of the month following that in which said gas was consumed.	Sixty (60) cents per 1,000 cubic feet of gas for the next 19,500 cubic feet per month. Fifty-five (55) cents per 1,000 cubic feet of gas for all over 20,000 cubic feet per month.

[fol. 184]

Troy, Ohio:	
$1.00 for the first 500 cubic feet or less of gas consumed each month.	One (1) dollar for the first 500 cubic feet of gas per month.
Fifty cents per 1,000 cubic feet for all over 500 cubic feet of gas consumed each month, with an additional charge of five cents per 1,000 cubic feet where bills are not paid on or before the 10th of the month following the month in which service is rendered.	Sixty (60) cents per 1,000 cubic feet of gas for the next 19,500 cubic feet per month. Fifty-five (55) cents per 1,000 cubic feet of gas for all over 20,000 cubic feet per month.

Rates in effect immediately prior to July 17, 1929	Proposed rates filed June 17, 1929
Troy, Ohio (Suburban):	
$1.00 for the first 500 cubic feet or less of gas consumed each month.	One (1) dollar for the first 500 cubic feet of gas per month.
Fifty cents per 1,000 cubic feet for all over 500 cubic feet of gas consumed each month, with an additional charge of five cents per 1,000 cubic feet where bills are not paid on or before the 10th of the month following the month in which service is rendered.	Sixty (60) cents per 1,000 cubic feet of gas for the next 19,500 cubic feet per month. Fifty-five (55) cents per 1,000 cubic feet of gas for all over 20,000 cubic feet per month.
Washington District	
Washington C. H., Ohio:	
75 cents per 1,000 cubic feet. A discount of 5 cents per 1,000 cubic feet shall be given when bills are paid on or before the 10th day of the month for gas consumed during the preceding month. Minimum charge—$0.75 per month.	One (1) dollar for the first 500 cubic feet of gas per month. Sixty (60) cents per 1,000 cubic feet of gas for the next 19,500 cubic feet per month. Fifty-five (55) cents per 1,000 cubic feet of gas for all over 20,000 cubic feet per month.
Xenia District	
South Charleston, Ohio:	
$1.00 for the first five hundred (500) cubic feet or less, or none, of gas consumed each month.	One (1) dollar for the first 500 cubic feet of gas per month.
Fifty (50) cents per thousand (1,000) cubic feet for all over five hundred (500) cubic feet of gas consumed	Sixty (60) cents per 1,000 cubic feet of gas for the next 19,500 cubic feet per month.

each month with an additional charge of five (5) cents per thousand (1,000) cubic feet where bills are not paid on or before the tenth of the month following the month in which service is rendered.	Fifty-five (55) cents per 1,000 cubic feet of gas for all over 20,000 cubic feet per month.
Wilberforce, Ohio:	
$1.00 for the first five hundred (500) cubic feet or less, or none, of gas consumed each month.	One (1) dollar for the first 500 cubic feet of gas per month.
Fifty (50) cents per housand (1,000) cubic feet for all over five hundred (500) cubic feet of gas consumed each month, with an additional charge of five (5) cents per thousand (1,000) cubic feet where bills are not paid on or before the tenth of the month following the month in which service is rendered.	Sixty (60) cents per 1,000 cubic feet of gas for the next 19,500 cubic feet per month. Fifty-five (55) cents per 1,000 cubic feet of gas for all over 20,000 cubic feet per month.

[fol. 185] Before Public Utilities Commission of Ohio

Advanced Utility Rate Proceeding No. 341

In the Matter of the Proposed Increased Rates of The Dayton Power and Light Company for Gas Service Filed to Become Effective July 17, 1929

Order for Hearing, etc.

It appearing, That under date of June 17, 1929, The Dayton Power and Light Company filed with this Commission, to become effective July 17, 1929, certain proposed sched-

ules providing increased rates and charges for gas service; such schedules being identified as follows:

P. U. C. O. Number	Applicable to
3	Jeffersonville, Ohio.
4	Sidney, Ohio.
4	Washington Court House, Ohio.
5	Covington, Ohio.
5	Troy, Ohio.
5	Tippecanoe City, Ohio.
5	Piqua, Ohio.
6	Territory outside of and adjacent and contiguous to the corporate limits of Troy, Ohio.
6	North Hampton, Ohio, and territory contiguous and adjacent thereo.
7	South Charleston, Ohio.
8	Wilberforce, Ohio;

It further appearing, That complaints have been filed with the Commission by the City of Washington Court House, Ohio, against said schedule P. U. C. O. No. 4 applicable to Washington Court House, Ohio; by the City of Troy, Ohio, against said schedule, P. U. C. O. No. 5, applicable to the said City of Troy, Ohio; by the City of Piqua, Ohio, against said schedule, P. U. C. O. No. 5, applicable to the said City of Piqua, Ohio, and by one E. Champ Warrick, Wilberforce, Ohio, against said schedule, P. U. C. O. No. 8, applicable to Wilberforce, Ohio, and

The Commission finding that the rights and interests of the public may be injuriously affected by the increased rates and charges set forth in all of the aforesaid schedules and that an investigation should be made to determine the propriety of such increased rates and charges, it is

Ordered, That the Commission, without answer or other form of pleading from the said The Dayton Power and Light Company, enter upon a hearing concerning the pro- [fol. 186] priety of the rates, charges, regulations and practices published in all of the proposed schedules as hereinabove named and identified and that said hearing be begun at ten o'clock A. M., Eastern Standard Time, Thursday, September 12, 1929, at the Hearing Room of the Com-

mission, State Office Building, Columbus, Ohio. It is further

Ordered, That the operation of said proposed schedules and the use and operation of the rates, charges, regulations and practices contained therein be, and hereby they are, suspended and postponed for a period of 120 days from June 17, 1929. It is further

Ordered, That a copy of this Order be filed with said proposed schedules in this office and that a copy thereof be forthwith served upon the said the Dayton Power and Light Company, which hereby is made a respondent in this proceeding and notified of the time and place of the hearing herein assigned.

The Public Utilities Commission of Ohio, Roscoe C. McCulloch, Chairman; Frank W. Geiger, Wm. Klinger, Commissioners.

Dated at Columbus, Ohio, this 9th day of July, 1929.

A true copy:

Ira E. Sprankle, Superintendent of Investigation.

[fol. 187] BEFORE PUBLIC UTILITIES COMMISSION OF OHIO

[Title omitted]

ELECTION OF APPELLANT TO CHARGE PROPOSED RATES, ETC.

To the Public Utilities Commission:

Now comes The Dayton Power and Light Company, the respondent in the above proceeding, and represents that the hearing in said proceeding cannot be concluded with the period of suspension rates involved, to wit: within 120 days from June 17, 1929, and respondent proposes to give a bond according to law so that said rates shall go into effect at the end of said period of suspension and prays your Honorable Commission to fix the amount of such bond and suggests that sixty-five thousand dollars will be a sufficient amount and to justify this suggestion has attached hereto an exhibit, which is made part hereof, of the estimated annual increase in revenues that will be derived by respondent under said rates.

Respondent also files herewith its bond in the sum of $65,000, with surety conditioned according to law, together with certified copies of resolutions of the directors of respondent and its surety authorizing the execution of the bond, and prays said bond be approved.

Matthews & Matthews, Attorneys for The Dayton Power and Light Company.

[fol. 188] BEFORE PUBLIC UTILITIES COMMISSION OF OHIO

[Title omitted]

ORDER APPROVING BOND

The Dayton Power and Light Company, respondent, having elected to place in effect, at the expiration of the period of suspension, the rates and charges set forth in its schedules under investigation in this proceeding, and having tendered for filing with, and approval by, the Commission, as provided by law, a bond in the sum of $65,000.00, covering the estimated amount of the increase in said rates and charges over a period of one year, with the respondent, The Dayton Power and Light Company, as principal, and The Union Gas and Electric Company, a corporation organized and existing under the Laws of the State of Ohio, and also, O. E. Howland and E. P. Matthews, individuals, as sureties, together with certified copies of resolutions adopted by the Board of Directors of each of the aforesaid companies authorizing the execution and filing of said bond; and

It appearing, That the conditions of said bond are in conformity to law, said bond hereby is approved and permitted to be filed on the further condition that the Commission reserves to itself the right always to change the amount of or modify the conditions of said bond or to require said respondent to furnish other or additional surety or sureties.

The Public Utilities Commission of Ohio, Roscoe C. McCulloch, Chairman; Frank W. Geiger, Wm. Klinger, Commissioners.

Dated at Columbus, Ohio, this 9th day of October, 1929.

A true copy:

Ira E. Sprankle, Superintendent of Investigation.

[fol. 189] BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

[Title omitted]

BOND

Know all men by these presents: That the undersigned, The Dayton Power and Light Company, a corporation organized and existing under the laws of the State of Ohio, hereinafter called the Utility, as principle, and The Union Gas and Electric Company, a corporation organized and existing under the laws of the State of Ohio, and E. P. Matthews and O. E. Howland, as sureties, are held and firmly bound unto the State of Ohio, in the full and just sum of Sixty-Five Thousand Dollars ($65,000) lawful money of the United States, to the payment whereof, well and truly to be made, they do hereby and by these presents, bind themselves, their successors and assigns.

The condition of this obligation is such that:

Whereas, the Utility has filed with The Public Utilities Commission of Ohio, hereinafter called the Commission, schedules effecting increases in rates and charges for its natural gas service furnished consumers in various municipalities and communities in the State of Ohio; and

Whereas, the Commission, having filed with such schedules and delivered to said Utility, a statement, in writing, of its reasons for such suspension, has suspended the operation of such schedules and has postponed the use and operation of such rates and charges for a period of one hundred and twenty (120) days from June 17th, 1929; and

Whereas, a hearing concerning the propriety of such rates and charges cannot be concluded within the suspension period as above stated; and

Whereas, the Utility, pursuant to Section 614-20 of the General Code of Ohio as amended by an act approved April 19th, 1923, proposes to execute and file with the Commission an undertaking pursuant to and in accordance with the provisions of said Section as so amended, in order that such increased rates or charges shall go into effect at the end of the said period of One hundred and twenty (120) days.

Now therefore, if the said Utility shall well and truly repay to each and every corporation and person, Treasurer

of the County or other political subdivision entitled thereto, at such time and in such amounts and in such manner as the Commission shall order, such portion of such increased rates or charges collected by said Utility as the Commission, upon final hearing may determine to have been unreasonable or excessive, with interest at the rate of six per cent (6%) per annum, from the date of payment by the consumer to the date of repayment by the Utility, and shall otherwise comply with the provisions of the law relating thereto, then this obligation shall be void, otherwise, to remain in full force and effect.

In witness whereof, the Utility, the said The Dayton Power and Light Company, as principal, and the said The Union Gas and Electric Company, as surety, have caused this bond to be executed and sealed in their names, by their proper officers, respectively, thereunto duly authorized, this 9th day of October, A. D. 1929.

The Dayton Power and Light Company, by O. H. Hutchings, Vice President. (Seal.)

Attest: O. E. Howland, Secretary.

The Union Gas and Electric Company, by H. C. Blackwell, President.

Attest: Polk Laffoon, Secretary.

Attest: David Shaw Archer, M. R. Weltner, E. P. Matthews, O. E. Howland.

[fol. 190] Before Public Utilities Commission of Ohio

[Title omitted]

Order re Additional Evidence—November 21, 1930

Where a public utility, distributing natural gas applies for an increase in rates and it appears that such utility has entered into a contract to pay a transportation company a gateway price of 45¢ per thousand cubic feet and it further appears that said contract was made under the supervision of a managing company and that all the common stock of the distributing company, the transportation company and the managing company, is owned or con-

trolled by the same holding company, the burden is upon the company asking for an increase in rates to show that the gateway price is just and reasonable to the distributing company and to the consumer.

This case involves the rates charged by The Dayton Power and Light Company for natural gas furnished by it at North Hampton, Piqua, Sidney, South Charleston, Tippecanoe City, Troy, territory adjacent to Troy, Washington C. H. and Wilberforce, towns in the vicinity of Dayton. This territory will be hereinafter designated as "the eight towns."

[fol. 191] On June 17, 1929, the company filed with the commission, new schedules to be charged for gas supplied to the eight towns and to others which have since adjusted their rate by municipal action. The rate proposed is $1.00 for the first 500 cubic feet per month; 60¢ per 1000 cubic feet for the next 19,500 cubic feet per month; 55¢ per 1000 cubic feet for all over 20,000 cubic feet per month; 3¢ per thousand to be added when bills are not paid within five days.

Protests against those proposed rates were filed by several of the towns involved. The new schedules were filed before the effective date of the Carpenter amendment and the case not being heard within 120 days, the company filed a bond to secure repayment.

For several years prior to the filing of the new schedule, the established rate for all of the eight towns involved, except Washington C. H., was $1.00 for the first 500 cubic feet; 50¢ per thousand cubic feet for all over 500. For Washington C. H., the rate had been 75¢ per 1000 cubic feet.

The company owns the gas distribution systems in the towns where it supplies natural gas only. It does not own any transmission pipe lines. It buys from The Ohio Fuel Gas Company, under wholesale contracts, at 45¢ per thousand cubic feet, delivered at the several city gates, all gas it supplies to consumers. The revenues of the company in 1929, from the eight towns, was $679,444.00; the number of gas consumers in this territory being 14,019.

The company claims the present value of the property, [fol. 192] incident to the business of the eight towns, to be $1,250,221.00, including a certain proportion of the real

estate in the city of Dayton. The company uses certain percents in allocating to the eight towns the value of its property as well as the cost of the operation.

The company claims that for 1929, it not only received no return on the value of its property in the eight towns, but lost $42,830.00 and that under the proposed rates, the estimated revenue would be $741,622.00 and the estimated expenses $726,531.00, leaving a balance of $15,091.00 after expenses, for a return upon the property, far below the income to which it is entitled.

The common stock of the company is owned by The Columbia Gas and Electric Corporation. The preferred stock is scattered among 3300 different stockholders.

The company introduced evidence tending to support its claim as to the valuation of its property and that it was entitled to the advanced rates.

The expense of the eight towns for 1929, exclusive of taxes, was $697,529.00 of which amount $537,081.00 was paid to The Ohio Fuel Gas Company for gas purchased at the gateway price of 45¢ per thousand cubic feet.

All the stock of The Ohio Fuel Gas Company and all the common stock of The Dayton Power and Light Company is owned directly or indirectly by The Columbia Gas and Electric Corporation. Each of said companies has a contract with The Columbia Engineering and Managing Corporation for certain operating purposes. The stock of The Columbia Engineering and Managing Corporation is also owned by The Columbia Gas and Electric Corporation.

[fol. 193] After the introduction of the testimony by the company, the eight towns moved that the application be denied, for the reason, among others, that the evidence shows that the Dayton company and The Ohio Fuel Gas Company, from which it purchased its gas, are owned and controlled by The Columbia Gas and Electric Corporation and are subject to common management and that the gateway price of 45¢ per thousand cubic feet charged the company is not justified.

The eight towns further urge that by reason of the interrelation of the several companies, the contract for the gateway rate is not in fact a contract between The Dayton Power and Light Company and The Ohio Fuel Gas Company and that the same must be disregarded and that the

burden is upon the applicant to prove the reasonableness of the gateway price charged by The Ohio Fuel Gas Company, the transportation company.

Burden of Proof

Under Section 528 G. C., the burden rests upon the company to prove the reasonableness of the increase of rates. This necessarily implies that the company must justify the operating expenses entering into these rates.

The company claims that the contract is prima facie evidence of the reasonableness of the rates and that if no evidence is offered to the contrary, the company has discharged the burden of proof imposed upon it. It asserts that the presumption is that the contract is made in good faith and that to overcome this presumption, it is incumbent upon the protestants to prove that the contract was not [fol. 194] made in the exercise of the proper discretion of the plaintiff's officers; that while the agreements between the associated companies are to be scrutinized carefully, they may not be rejected as shams, nor may the findings of the commission as to what would be a reasonable contract, be substituted for the judgment of the officers of the company, unless it appears that the contract was made in bad faith and as a device for unduly enhancing the earnings of the transportation company at the expense of the distributing company.

The company asserts that it has discharged the burden imposed upon it when it has shown the contract, the circumstances of its execution and when it has further shown by competent evidence that the prevailing gateway price for companies similarly situated, is the same as that charged to this company and that there was not available to it gas from any source, which it could purchase at a less rate.

The witnesses for the company testified as to the gateway prices in various municipalities of the state, most of such gateway prices being those charged by The Ohio Fuel Gas Company or some related transportation company. Most of these prices were 45¢ or over.

Witness Weber, on cross-examination, testified that The Oho Fuel Gas Company purchased gas from independent producers at 18¢, 20¢, 22¢, and 22½¢ and that it had made an offer of 15¢ for the purpose of influencing small well producers local to its transportation line, but that 15¢ had

produced no result and that the company had not offered more.

[fol. 195] Under the circumstances above sketched, the question is whether or not the company has met the burden imposed upon it by the statute by proving a gateway price fixed by a contract between a producing and a transportation company and a distributing company, all of whose common stock is held by The Columbia Gas and Electric Company and which contract was made under the general supervision of a managing corporation whose stock is likewise held by the same holding company, without attempting to otherwise show that the gateway price is reasonable except by the fact that the same or a higher price is paid elsewhere.

It is the duty of the commission to carefully scrutinize this contract and most of the cases to which counsel has referred, indicate that evidence was adduced which permitted such close scrutiny in the cases under consideration and that evidence was given as to the reasonableness of the price paid by the regulated company.

The commission is impressed with the view of the court in the case of Ohio Mining Co. v. Public Utilities Commission, 106 O. S., 138, where it is held:

"Where a corporation is not a public utility within the definition of the General Code, the Public Utilities Commission is without power to make an order affecting such corporation. But where a contract of such corporation involves the rates and charges which a public utility must receive to earn a fair return on its investment, the public utilities commission may investigate and determine whether such contract is just and reasonable to the public utility by the standard of the cost of production by such public utility, or by the standard of the price at which such public utility may be able to purchase such product from other [fol. 196] persons or corporation, or both, and may base upon such finding, plus a reasonable return upon the investment of the public utility and a reasonable sum for depreciation, the price and charge at which such public utility shall sell its service."

The case of People v. The Michigan Bell Telephone Company, 246 Michigan, 198, seems to us to have much weight in favor of the proposition that contracts such as the pres-

ent should be considered not only from the viewpoint that the contract exists, but from the broader view as to the conditions under which it was executed and whether or not the circumstances leading to its execution, have any just bearing upon the rate.

In the case of the United Fuel Gas Company v. Railroad Commission of Kentucky, 278 U. S. 300, 73 Law Ed. 390, Mr. Justice Stone said:

"We need not labor the point that a public service corporation may not make a rate confiscatory by reducing its net earnings through the device of a contract unduly favoring a subsidiary or a corporation owned by its own stockholders. * * * and common ownership is not of itself sufficient ground for disregarding such intercorporate agreements when it appears that, although an affiliated corporation may be receiving the larger share of the profits, the regulated company is still receiving substantial benefits from the contract and probably could not have secured better terms elsewhere."

Counsel for the company urges that this case is directly in its favor, but we do not so read it. A careful reading of this case indicates a view opposite to that urged by counsel for the company.

[fol. 197] If the commission may not investigate the contract entered into between a distributing company and a transportation company, through a managing corporation, whose common stock in turn is held by the same corporation that holds the common stock of the two contracting companies, the authority of the commission is circumscribed.

The gateway price being the major portion of the total expenses of the distributing company, the commission's investigation as to the fair value of the property of the distributing company and the reasonableness of its other expenses is of but little consequence, if it must accept the gateway contract as final.

The parties in this case are so situated that the evidence which would throw light upon the justness of the 45¢ gateway rate is within the control of the company and not easily available to the eight towns.

We therefore conclude that; under the present condition of evidence, we should not go further into an expensive

check of the company's valuation of the physical plant until we have determined whether the gateway rate is just. We do not hold the contract between the producing and the distributing company void or a sham or fraudulent, but we take the position that at this time it is incumbent upon the company to produce all available evidence within its control touching the fairness of the gateway rate.

If the evidence so produced establishes the fairness of the gateway rate, we shall then go forward to determine the question of the value of the property under the evidence now before us.

[fol. 198] The order of the commission will therefore be that the company produce all the evidence available touching the cost of producing or acquiring and transmitting the gas to the several gateways and of the fairness of the gateway rate of 45¢, and failing to do this within a reasonable time, the application for the increase of rates will be denied.

An order will issue accordingly.

[fol. 199] BEFORE PUBLIC UTILITIES COMMISSION OF OHIO

ORDER MODIFYING ORDER OF NOV. 21, 1930—January 9, 1931

This day, The Dayton Power and Light Company appeared before the commission and advised the commission that in accordance with the order of November 21, 1930, herein it will introduce further evidence to justify the gate rate price of 45 cents per 1,000 cubic feet paid by it to The Ohio Fuel Gas Company for natural gas supplied by it to the eight towns involved in this proceeding and it asks leave to withdraw its application for a rehearing in the matter of said order and asks that the time to introduce such further evidence be extended to a day to be fixed therefor after the close of the evidence in the proceeding pending before the commission numbered 5935 and entitled In Re Complaint and Appeal of Columbus Gas and Fuel Company v. Columbus Ordinance, etc.

Now the commission gives The Dayton Power and Light Company leave to withdraw its said application for rehearing, which is accordingly done, and the commission extends the time for the introduction of further evidence to justify said gate rate for natural gas to a time to be fixed by the

commission and said order of November 21, 1930, is modified in accordance herewith.

[fol. 200] BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

[Title omitted]

STIPULATION AS TO INTRODUCTION OF EVIDENCE IN COLUMBUS CASE—Filed October 25, 1932

Complying with the Order of the Commission, dated November 21, 1930, that the respondent introduce additional evidence in justification of the price paid by it to The Ohio Fuel Gas Company for gas supplied by the latter company to the respondent, delivered at or near the respective city gates, and hereinafter called the city gate prices, and in compliance with the Commission's further Order of October 17, 1932, the respondent offers to introduce in evidence in these proceedings so much of the evidence taken in the Matter of the Complaint and Appeal of The Columbus Gas and Fuel Company from an Ordinance of the City of Columbus, Ohio, to Regulate the Price that may be Charged for Natural Gas in the City of Columbus, No. 5935, as bears on the reasonableness and lawfulness of the price which The Columbus Gas and Fuel Company pays to The Ohio Fuel Gas Company for gas furnished and delivered at the city gate of the City of Columbus, with the same force and effect as if the witnesses in said Columbus proceeding whose testimony is herein referred to were introduced in this proceeding and testified herein as they testified in that proceeding, including all exhibits pertinent to said city gate price, reserving to the respondent any and all objections and exceptions to the said evidence, or any part thereof, and also any and all motions to strike out any portion or portions thereof, made on behalf of the appellant in said proceedings; and also reserving to the several complainants in these proceedings any and all objections and exceptions to the said evidence, or any part thereof, and also any and all motions to strike out any portion or portions thereof, made on behalf of the City of Columbus.

This offer is made without waiver of, or prejudice to, its contention that it has already introduced in this proceed-

[fol. 201] ing sufficient evidence to justify said city gate price and without waiver of, or prejudice to, its contention that said Orders of November 21, 1930, and October 17, 1932, are unreasonable, unlawful and erroneous, but solely in order that the Commission may not make or enter in these proceedings on the record as it stands, as contemplated in said Order of November 21, 1930, any further order or determination adverse to the respondent, or sustaining the complaints in these proceedings, or any of them, without fixing and determining, on the record as it stands, the value of respondent's property used and useful for the convenience of the public in the complaining cities, municipalities and towns, and without determining the reasonableness and lawfulness of the respondent's rates here under investigation. The respondent, while agreeing to the introduction in these proceedings, of the evidence in the Columbus case, pertinent to the city gate price does not agree with certain findings and conclusions of the Commission with reference thereto.

The Dayton Power and Light Company, (Sgd.) by Matthews & Matthews, John E. Mullin, Charles P. Pfaner, Chester J. Gerkin, Its Attorneys. The Complainants, (Sgd.) by A. Newton Browning, City Solicitor, City of Washington, Ohio; Tatum & Rush, Attorneys for the Village of S. Charleston, Ohio, and N. Hampton, O.; Paul T. Klapp, Attorney for Tippecanoe City, Ohio; Paul G. Gingrich, Attorney for City of Troy, Ohio.

[fol. 202] BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

[Title omitted]

STIPULATION AS TO INTRODUCTION OF EVIDENCE IN COLUMBUS CASE—Filed Oct. 31/32

It is agreed by and between the complainants whose counsel sign this stipulation and the respondent, that the following portions of the evidence in the Matter of the Complaint and Appeal of The Columbus Gas and Fuel Company from an Ordinance of the City of Columbus to Regulate the Price that may be Charged for Natural Gas within the City of Columbus, No. 5935, shall be filed as a

part of the evidence in this proceeding, under the stipulation and agreement entered into between the said complainants and the respondent and filed with the Commission on October 25, 1932, and the order of the Commission made in connection therewith, to-wit:

Company Exhibits: Numbered 20, 21, 23 to 23C, inclusive; 43 to 62, inclusive; 64, 69, 70 to 87, inclusive; 89, 92B, 93B, 101 to 156, inclusive; 160 to 175A, inclusive; 177 to 198, inclusive; 206, 207, 209, 210.

City Exhibits: Numbered 6, 7, 8, 11, 14 to 19, inclusive; 21 Seyffert; 21 Butler; 22 to 38, inclusive; 40, 41A to E, inclusive; 43, 46 to 51, inclusive; 53, 54, 62 to 65, inclusive; 66 to 86, inclusive; 88 to 116, inclusive.

[fol. 203] Commission Exhibits: Numbered 1 and 2.

The testimony, or specified portions of the testimony, of the following witnesses, to-wit: P. Antonelli, E. L. Carter, H. W. Cly, A. B. Dally, Jr., D. J. Demorest, Arthur S. Dewing, Harold C. Goekenbach, C. C. Guthrie, F. C. Hamilton, W. J. Hightower, John E. Kelley, F. H. Lerch, Jr., Samuel W. Meals, A. J. Newman, J. F. Nitschke, Warren S. Park, Leon J. Popperberg, Frank W. Phillips, Harold A. Ritz, E. E. Roth, L. A. Seyffert, beginning at page 815 of the transcript; Fred A. Ullmer, C. F. Waterman, beginning at page 5533 of the transcript; C. I. Weaver, D. S. Webber, T. R. Weymouth, B. H. Wheeler, R. G. Winans, [fol. 204] Geo. Wittmer, Jr., U. D. Zinn, Harry R. Allensworth, beginning at page 4285; J. Paul Blundon, James M. Butler.

It is further understood and agreed by and between the parties that if any of the said complainants, or the respondent, hereafter deem that any additional evidence in said Columbus case should be introduced in this proceeding, the attention of the Commission and of opposing counsel shall be called to said proposed additions and same shall be filed as a part of the evidence in this proceeding under the said stipulation.

The Dayton Power and Light Company, by Edwin P. Matthews, John E. Mullin, Chester J. Gerkin, Charles P. Pfaner, Its Attorneys. The Complainants, by Tatum & Rush, Attorneys for the Villages of North Hampton & South Charleston; Paul T. Klapp, City Solicitor of Tippecanoe City; Paul Gingrich, City Solicitor of Troy.

[fol. 205] BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

[Title omitted]

ORDER AS TO EVIDENCE INTRODUCED UNDER STIPULATION

A stipulation having been offered by the company as to the introduction of evidence bearing upon the reasonableness of the gate rate, and what shall be considered in this case, and the same having been agreed to by the attorneys for the Village of South Charleston, Ohio, North Hampton, Ohio, the attorneys for Tippecanoe City, Ohio, and the attorneys for the City of Troy, Ohio, and it further appearing that the proper officers of each of the other cities or municipalities or territories affected by the proposed schedules have had due notice of the time and place of this hearing and are not now present, it is by the Commission,

Ordered, That insofar as the stipulation may affect any towns, cities or other territories which are not here represented by counsel by whom said stipulation is signed, that as to such non-signing parties, the evidence here offered by the company shall be considered the evidence in this case as is specifically set out in said stipulation, and same shall be regarded as binding upon the parties the same as if said parties were present at the time of this hearing and had agreed thereto.

The Public Utilities Commission of Ohio, E. J. Hopple, Chairman; John W. Bricker, Commissioners.

Dated at Columbus, Ohio, this 25th day of October, 1932.

A true copy:

Ira E. Sprankle, Superintendent of Investigation.

[fol. 206] BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

[Title omitted]

ORDER MAKING FINDINGS IN COLUMBUS CASE PART OF RECORD—November 23, 1932

The Dayton Power and Light Company having presented to the Commission true copies of the finding of facts and of the order of October 3rd, 1932, in proceeding No. 5935

before the Commission entitled, "In the Matter of the Complaint and Appeal of The Columbus Gas and Fuel Company from an Ordinance of The City of Columbus, Ohio, to regulate the price that may be charged for natural gas in the City of Columbus," upon motion of The Dayton Power and Light Company, said copies are admitted in evidence and made part of the record in this proceeding and order filed herein as of October 31, 1932.

The Public Utilities Commission of Ohio, E. J. Hopple, Chairman; Frank W. Geiger, Commissioners.

Dated at Columbus, Ohio, this 23rd day of November, 1932.

A true copy:

Ira E. Sprankle, Superintendent of Investigation.
(Seal Public Utilities Commission of Ohio.)

[fol. 207] BEFORE PUBLIC UTILITIES COMMISSION OF OHIO

[No. 5935]

In the Matter of the Complaint and Appeal of THE COLUMBUS GAS & FUEL COMPANY, to Regulate the Price That May be Charged for Natural Gas Within the City of Columbus

OPINION OF OCTOBER 3, 1932

The city council of the city of Columbus, on the third of September, 1929, under an appropriate statute, enacted an ordinance designated as No. 645-29.

"To regulate the price that may be charged for natural gas in the City of Columbus during the period of five years from the twelfth day of November, 1929, and providing for the submission of the ordinance to a referendum vote at the election to be held November 5, 1929."

The ordinance provided the following rates:

"Seventy-five cents as a minimum per month per customer, from which there shall be no discount.

[fol. 208] "Forty-eight cents for each thousand cubic feet of natural gas, having heat value of not less than nine hun-

dred British thermal units (gross) per cubic foot consumed through each meter each month,"

with a penalty of five cents if the bills are not paid within the time prescribed by the rules of the company.

It is further provided that "no extra or additional charge shall be made for meter rentals."

This ordinance was submitted to the electors of the city on the fifth of November, 1929, and approved. The Columbus Gas and Fuel Company, one of the two companies furnishing gas within the limits of the city, not being satisfied with the ordinance filed its appeal with this commission under Sections 614-44 et seq. These sections provide in substance that the city may pass an ordinance fixing the gas rate, and that the utility, if not satisfied, may file a complaint with the commission, and that the commission on such complaint may proceed to fix just and reasonable rates. If the commission, after a hearing, shall be of the opinion that the rate fixed by ordinance is unjust and unreasonable or insufficient to yield reasonable compensation for the service rendered, it shall, with due regard to the value of all the property of the public utility actually used and useful for the convenience of the public, exclusive of any value added thereto by reason of the monopoly or merger, and with due regard to the necessity of making reservation from income for surplus, depreciation and contingencies and such other matters as may be proper according to [fol. 209] the fact in each case; fix a just and reasonable rate to be charged during a period fixed by ordinance, which shall not be less than two years, and order the same substituted for the rate fixed by ordinance, or the Commission may find that the rate so fixed by the ordinance is just and reasonable and ratify and confirm the same.

The Columbus Gas and Fuel Company—Historical

The Columbus Gas and Fuel Company and its predecessors has been distributing natural gas in the city of Columbus since 1890 at various rates. In 1901 the rate was fixed at 35 cents for a period of ten years, which was afterwards extended for a period of five years. In 1921 the rate was fixed for three years at 45 cents for the first 10,000 cubic feet, increasing to 65 cents for all over 20,000 cubic feet. In 1924 the rate was fixed at 40 cents. On June 3,

1929, council passed an ordinance fixing the rate at 75 cents minimum and 60 cents and 55 cents for larger quantities, which ordinance also provided for the settling of all existing litigation between the city and the company.

In December, 1929, the United States District Court held that this latter ordinance did not constitute a contract, because it had not been submitted to a vote of the people. This decision was subsequently affirmed by the United States Circuit Court of Appeals. The city council, having repealed the ordinance of June 3, 1929, passed, on September 3, the forty-eight cent ordinance, which was approved by the electors but not accepted by the company, and is the basis of the present controversy.

[fol. 210] In the earlier period of service to the city of Columbus, gas was produced by the companies so serving it in the fields of Licking and Knox counties. In later periods a contract was made by the distributing company with The Ohio Fuel Supply Company and its successors, which producing companies were compelled to resort to some distant points of production, purchasing in West Virginia and Kentucky some of the gas sold to the local company. In the earlier periods of distribution the supply of gas was uncertain, so that the distribution to the consumers in Columbus was insecure. In later years the Ohio Fuel Supply Company and The United Fuel Company have extended their facilities to such an extent that the supply is now certain and dependable.

Interrelated Companies

The Columbus Gas & Electric Corporation is the holding company of the common stock of The Columbus Gas & Fuel Company and also The Ohio Fuel Gas Company, from which the local distributing company obtains its gas at wholesale rate at the Columbus gateway. It is also the holder of the common stock of The United Fuel Gas Company, a producing company south of the Ohio river, from which gas is purchased by The Ohio Fuel Gas Company, part of which is sold to Columbus and part distributed throughout other portions of Ohio. In some municipalities in Ohio The Ohio Fuel Gas Company is the distributing company, serving these communities without the intervention of a local distributing company.

The Columbia Engineering & Management Corporation, [fol. 211] also a subsidiary of The Columbia Gas & Electric Corporation, is an interrelated company whose function is to supervise the management of the producing, transmission and distributing companies, and to make the contracts on behalf of each company with the other. For this service so rendered by the management company a charge is made of from two to two and one-half per cent on the gross earnings of the several companies so managed by it. We will deal with this company more at length later in this opinion.

It is thus apparent that the company distributing gas as a public utility within the city of Columbus is closely interrelated with the producing, transmission and management corporation whose common stock in turn is held by the Columbia Gas & Electric Corporation, the parent company.

The Position of the Commission

The Commission early took the position that inasmuch as these companies were so intimately related, in order to determine whether or not the rate charged to the ultimate consumer was a fair one, it was obviously necessary to examine the entire structure to ascertain whether the rate charged by The Ohio Fuel Company at the gateway was justified.

At the beginning of the Commission's investigation this was a pioneer service inasmuch as no court of final resort had definitely passed upon the right of the Commission to extend its examination beyond the gateway of the city [fol. 212] whose ordinance was under investigation. The case tried and determined by the Hon. Judge Benson R. Hough did not extend beyond the gateway, and the contract between the supplying and distributing company was to the effect that the supplying company should have 65% and the distributing company 35% of the rate charged the consumer. Judge Hough determined at that time that the rate to the consumer should be 48 cents, 65% of which, amounting to 31.20 cents was fixed as the gate rate, and 35% amounting to 16.80 cents, was the distribution charge.

During the commission's consideration of the case, the decision in Smith v. The Illinois Bell Telephone, 282 U. S. 183 (75 L. Ed. 257), was announced by the United States

Supreme Court. This case involved, among other things, the interrelated Bell Telephone organization and gave approval to the commission's right to examine into the profits that may have been derived by a related non-regulated company from its contract with the regulated utility. The court held that there should be a finding as to the net earnings of an affiliated company and the extent to which such profit figures in the estimates upon which a charge of confiscation is predicated. The commission has always felt that it had the right to carefully scrutinize the contracts made between affiliated companies, even though one may not be within the control of the commission, in order to determine to what extent the unregulated company may have derived unjust profits by an overcharge to the regulated company.

At a later date the Supreme Court decided in the case [fol. 213] of Western Distributing Company v. The Public Service Commission of Kansas, which directly involved a gate rate in a gas case. This case was decided February 29, 1932, 52 U. S. 283 (76 L. Ed 404). It was there held,

1. An inquiry by a state commission into the reasonableness of amounts paid by a local distributing utility for its gas supply under contract with a wholesale interstate supply company, where both companies are controlled by a common parent concern, is not an attempted interference with interstate commerce * * * where the commission confines its efforts to determining the reasonableness of the expenses of the local distributing subsidiary;

2. A subsidiary distributing gas utility, before being allowed an increase in its rates, * * * may properly be required to offer satisfactory evidence with respect to all costs which enter into the ascertainment of a reasonable rate, including reasonableness of rates paid to an affiliated wholesale supply company under a contract which was entered into in the absence of an arm's length bargain between the two corporate entities involved.

3. The fact that a certain gas rate between a wholesale * * * supply company and other distributing utilities had been found reasonable was * * * not * * * prima facie evidence as to the reasonableness of such wholesale rate * * *;

4. Allegations by a distributing utility company that the wholesale price paid * * * to an affiliated supply company was the lowest that it could obtain from the latter, or from any other available source of supply was * * * [fol. 214] meaningless in view of the intercorporate control exercised by a common parent concern over both companies.

The effect of this decision is to give to the commission the right to determine whether or not the gate rate charged by an affiliated company, which is not a utility, to the distributing company, which is a utility, is reasonable, and the commission is entitled to a fair showing of such reasonableness even though it may involve such a presentation of evidence as would not be required in the case of parties dealing at arm's length.

The burden is thus placed upon the company to fairly show that the gate rate is reasonable. This, in our judgment, does not involve the obligation to present, in relation to the supplying company, that character of evidence which by the statute is required to be presented when the rate charged by the distributing company, as a public utility, is under investigation. The obligation that is imposed upon the utility is to present such evidence as will enable the commission to determine whether or not the gate rate is reasonable, and any competent evidence upon this point may be considered, whether it presents the theoretical reconstruction of the property of the supplying company, or any other evidence from which the commission may determine the fairness of the gate rate.

The case, however, does definitely exclude from the consideration of the commission that evidence which seeks to establish the fairness of the gate rate by proof that the price was the lowest that could be obtained by the distribut- [fol. 215] ing company from the supplying company or from any other available source of supply. Under this rule much testimony presented by the company to the effect that the gate rate at Columbus was the same or lower than that charged at other places, and that there was no other source of supply to the distributing company, must be excluded from our consideration.

The company did present a mass of testimony touching every detail of the great system which has been built up for the purpose of acquiring and developing gas land through-

out the states of Ohio, West Virginia and to some extent in Kentucky, and of the transportation of gas from the fields to the points of ultimate distribution. In addition to the lands now used as a present source of supply, it also developed the facts that the company holds in reserve under lease hundreds of thousands of acres of lands not yet developed but which are a potential reservoir which must be controlled in order that a continuous supply of gas may be assured such as will justify the investment of large sums of money in transportation and distributing systems.

The commission has had opportunity to examine expensive equipment including powerful compressor stations where batteries of from eight to sixteen engines, each of 1500 horse power force the gas that has been collected from widely separated wells, under high pressure to the place of consumption through hundreds of miles of transmission pipe of large diameter. . .

The commission has gained some conception through many expert witnesses, having undoubted skill and experience, of results accomplished by the intelligent expendi- [fol. 216] ture of capital in an enterprise whose hope of reward rests upon its ability to furnish to many small consumers a commodity, the enjoyment of which is eagerly sought. The commission has been impressed with the fact that this great natural resource could not have benefited the consumer unless there had been an intelligent application of capital to its development and transportation. It has also been impressed that in a gas plant, more than in any other utility, there is a wide fluctuation between peaks and valleys of consumption, due to varied daily and seasonal requirements. An efficient gas system must stand ready to serve the highest demands of severe weather, devoting to that service an investment in development and equipment much beyond that sufficient for the average load from which reliable income is derived.

If the plant were in constant use of its full capacity, the price to the consumer would be less, but the plant must be built to meet the severest requirements, even though much of this capacity may remain in costly idleness during a large portion of the year.

On the other hand, the commission has had constantly in mind that a company enjoying the immunities of a public

utility, has no right to impose upon the consumers a heavier burden than that which should be justly borne, and that will produce a proper rate of return, considering the value of the property devoted to this public service and *to* the risks involved.

[fol. 217] Valuations

As the case was developed the valuations and the rate of return fall naturally into three divisions: (1) The valuation of the property and the rate of return of The United Fuel Gas Company, (2) The Ohio Fuel Gas Company, (3) The Columbus Gas & Fuel Company.

The United Fuel Gas Company

This company and its affiliated companies produce and transport natural gas in the states of West Virginia and Kentucky and The Ohio Fuel Gas Company purchases a portion of this gas at the Ohio river. As occurs in all cases where there is a contest as to the rate, there is a great divergence between the engineers supporting either side as to the proper value to be placed upon the company involved. In this case the company values the United Fuel property involved in the production of gas, a portion of which reaches the gateway at Columbus at $55,165,781.00. The city values the same property at $44,344,787.00. Between these figures lies a true valuation and the commission must endeavor to search this out from the mass of conflicting testimony.

For several years there has been pending in the state of West Virginia a gas rate case involving the property located in West Virginia and this testimony was offered en masse to this commission as the evidence bearing upon the valuation of this property. The West Virginia commission had arrived at a certain valuation and decided upon [fol. 218] a certain rate, which upon review by the Supreme Court of that state was reversed and the West Virginia commission again sought to re-value the property in accordance with the instruction of the Supreme Court. In this task they have so far failed, in that no two of the commissioners of that state can agree upon the proper rate, but during the pendency of further proceedings they have agreed upon a temporary rate for domestic and wholesale consumption.

Valuation of West Virginia Property

The entire commission is in agreement upon the value of the property used and useful devoted to the service of other than domestic and manufacturing customers in West Virginia, exclusive of the distribution system property and the proportion of the general property applicable thereto as of December 31, 1929, finding the same to be $37,422,-112.00. This corresponds to the total valuation asserted by the city of $44,344,787.00, being the sum of $11,000,000.00 less than the value claimed by the company as shown in Company's Exhibit No. 80, page 3. Of this property a certain proportion is allocable to The Ohio Fuel Gas Company on the basis of M c. f. sales to The Ohio Fuel Gas Company during the year 1929, and the commission has reached an unanimous conclusion as to this amount in the sum of $13,-556,684.00.

[fol. 219] Expenses and Return on Investment of West Virginia Property

The entire commission is not in accord as to the proper method of treating the item of expenses attributable to the West Virginia operation, the difference arising from the difference in treatment of delayed rentals and depreciation and amortization. The majority of the commission is of the view that as the evidence was presented in the case before the West Virginia commission, this commission is bound by the treatment thereof by that commission.

There was no segregation in the West Virginia case of producing and nonproducing acreage, the entire acreage held by the company being considered as a whole, and a majority therefore concluded that the question of delayed rentals, which will be treated more at length later in this opinion, does not arise in the West Virginia case.

The West Virginia commission treated the question of depreciation and amortization by allowing a certain per cent., for each of these items, to wit, 1.12% for depreciation and 4.15% for amortization, such per cents being estimated upon the property subject to those items. This method of computation was endorsed by the Supreme Court of West Virginia. On all other items of expense for the operation of The United Fuel Company the commission is in harmony.

Treating the expense items as the same were treated by the West Virginia commission, we arrive at a total expense based upon the sale of gas to The Ohio Fuel Gas Company [fol. 220] of $3,413,632.00, which being properly apportioned to the M c. f. of the gas sold at the river to The Ohio Fuel Gas Company gives a value to such gas of 22.04 cents. This amount is in close harmony with the temporary rate of 22.5 cents fixed by the West Virginia commission to be charged to those consuming in excess of 600,000 cubic feet per month. In other words, the rate fixed for the large users of gas in West Virginia is almost identical with what we have estimated to be the proper river rate to be charged by the West Virginia company to The Ohio Fuel Gas Company. While this amount is 4.25 cents more than the price that would have resulted had delayed rentals been excluded and had a flat rate of 2½% for depreciation and amortization been used instead of the figures used for those items by the West Virginia commission, yet this difference increases the Columbus gate rate only one cent due to the fact that the gas purchased from West Virginia is commingled with gas purchased and produced by The Ohio Fuel Gas Company at a less cost than the river rate. The commission allows 22 cents as a proper expense to The Ohio Fuel Gas Company for gas purchased by it at the river.

Should the question be asked why we allowed the company a larger sum for gas purchased in West Virginia than gas that might be produced in a sufficient quantity at a less rate in Ohio, the answer is that the West Virginia gas is an emergency gas and that the company will avail itself of cheaper gas wherever and whenever possible.

[fol. 221] The Ohio Fuel Gas Company

The next step in our examination is The Ohio Fuel Gas Company, operating throughout the Ohio territory and furnishing gas of its own production together with purchased gas to the ultimate consumer either directly in some municipalities or through the instrumentality of the related public utility in other municipalities, the latter being the case in Columbus. At the outset of our investigation we found a wide divergence in the estimation of the value of the property by the company and by the city, the company estimating the value of The Ohio Fuel at $140,364,827.00, while the city fixes a valuation of $68,518,245.00 for

the entire property, only a portion of which is allocated to the gateway of Columbus. At the outset of our examination certain paramount questions present themselves.

1. The proper valuation of gas lands.

2. Whether or not delayed rentals for non-productive lands shall be considered as an item of expense.

3. Proper amount to be allowed for.

a. Depreciation.

b. Amortization of gas lands and equipment connected therewith.

There are of course certain other questions of a general nature which affect the valuation of the property used and useful and the proper amount to be allowed for the expense of conducting the business.

[fol. 222] Valuation of Gas Land

Large gas companies, and especially the one now under consideration, have pursued the policy of acquiring, under lease, not only gas lands which have been tested and are known to be gas producing, but also other lands adjacent thereto, which from a geological study and their proximity to tested lands give promise of supplying a reservoir from which gas may be drawn through a long period of years.

That portion of the gas lands which are in actual production are designated in this case as "operated acreage"; while that portion still undrilled is known as "unoperated acreage."

In the case of the Logan Gas Company v. The Public Utilities Commission of Ohio, 121 O. S., 507, what is now known as the operated acreage was there designated "Class number 1," while the unoperated acreage was designated as "Classes number 2, 3 and 4" depending on the relative likelihood of each such class becoming producing acreage. In the case in question it was held by the Supreme Court in a somewhat divided opinion that neither class number 2, 3 or 4 should be considered in fixing the valuation of the property that was then used and useful. The commission has determined that the acreage at present used and useful by The Ohio Fuel Company in producing gas, a part of which reaches the Columbus gateway is

291,396 acres. The productive acreage is arrived at by considering all evidence touching the amount in operation including an estimate made by considering the average [fol. 223] number of acres put in operation by the drilling of a single well, it being asserted that from 75 to 80 acres are so put in operation. We have allowed 79.7 acres per well, there being on June 1, 1929, 3657 productive wells. In addition to the 291,396 acres now in production the company has under lease 2,542,791 unoperated acres, which it values at $24,752,000.00. Having determined the number of acres that are in operation and are therefore used and useful, the difficult question remains as to their present value. Manifestly the present value depends upon the quantity of gas below the surface, and as gas is withdrawn, the acreage becomes less valuable in proportion that the withdrawn gas bears to the gas still to be captured.

Witnesses have been produced by the company who have testified that productive acreage is worth in the market all the way from $39.34 to $100.00 per acre. And they have also testified that there have recently been within reasonably close territory actual sales of acreage at a definite valuation. We are at once confronted with the question of the probative value of evidence touching the market value. Such evidence could not be based upon the price between a willing buyer and a willing seller. In the very nature of the operation, companies have a monopoly within their own field, and further the value of the land in the market would depend upon the price which the regulated company may be permitted to charge to its customers. A market price could not be fixed where the value would be dependent upon the rate which could be charged when that [fol. 224] rate is within the control of a regulatory body and should depend upon the value of the land. To say that the value of the land is to be determined by the rate at which the gas may be sold and that the rate for which the gas may be sold depends upon the value of the land is reasoning in a circle, and such testimony can be of but little value.

This whole matter is discussed at length in The Logan Gas Company et al. v. Public Utilities Commission of Ohio, 124 O. S., 248, and an interesting discussion will also be found in the case of The United Fuel Gas Company v. Railroad Commission of Kentucky, 278 U. S., 300, (72 L. Ed.,

390). The great divergence of judgment as to the value of leasehold property under operation is evidenced by the fact that the city's estimate is $1,569,479.00 while that claimed by the company is $19,252,906.00. The Supreme Court in the Logan case above referred to sustained the commission in fixing the value of the Logan property, which is now a part of The Ohio Fuel property, at $25.00 per acre, which value was arrived at by the commission in that case (124 O. S., 248) under mandate from the Supreme Court in the first Logan case, 121 O. S., 507. The commission, on full consideration of all the evidence offered touching the value of the gas acreage in active operation, and giving consideration to its enhanced value due to delayed rentals which the company paid before such acreage came into the classification of "used and useful," fixes the value at $25.00 per acre. This valuation is approximately $2,500,000.00 more than the present book value. The proper estimate of the value of productive acreage is one of the most difficult [fol. 225] presented to the commission, as it is impossible to estimate the gas content of any acreage or the life of its productivity. Some witnesses in arriving at the value for the gas producing lands gave consideration to the fact that they were grouped together in one holding and were thus in the nature of a monopoly. We are not inclined to give much weight to that element of value, especially in consideration of the provision of Section 614-46,

"And exclusive of any value added thereto by reason of a monopoly or merger."

The entire commission is in harmony in fixing this value for the productive acreage at $7,284,900.00.

Delayed Rentals

The next question of major importance is what treatment shall be given to the delayed rentals paid by the company for the unoperated acreage which in its judgment it is necessary for it to place under lease to protect its property and provide reasonable security for a future continuous supply of gas.

It might well be argued that inasmuch as the Supreme Court of Ohio in the Logan Gas case, 121 O. S., 507, has definitely held that acreage, not now in operation could

not be considered in fixing the valuation of the property "used and useful", that it would follow logically that the cost of controlling this property during its period of non-productivity should not be placed upon the present rate payer.

[fol. 226] It is urged by the company that a wise business policy dictates that future requirements must be provided for to justify the expenditure of large sums of money in transportation and distribution facilities. It is insisted that the control of large reservoirs of gas for future use is the very foundation of the stability of the company and that without such reserve the company could not in justice to itself spend the sums necessary for transmission lines and for distribution within municipalities. It is insisted that it would be the height of folly to venture large sums which would be lost to the company if it were deprived of the back-log of gas reserves, and it is pointed out unless the company secure to itself these gas lands for future development, a rival company might come into the field and lease the lands placing the present company at the mercy of its rival, when it has exhausted the gas beneath what is now designated as productive acreage.

It is insisted that while the Supreme Court in the Logan Gas case, above referred to decided that unproductive lands could not be considered in fixing the base valuation, yet the question was not squarely placed before it as to whether or not the expense of carrying this acreage was a proper maintenance charge to be paid out of the income of the company, to be charged against the present rate payer.

It must be admitted that there is much force in the contention of the company. On the other hand it is urged that the present rate payer should not be penalized by a higher rate to take care of the future rate payer, it is urged that, [fol. 227] if the company as a matter of policy, decides to secure to itself gas reserves which are not at present used and useful that that is no concern of the present rate payer who is obliged to pay only a proper return upon the property used and useful.

The commission is of the opinion that inasmuch as the Supreme Court has held that the nonproductive acreage may not be considered in fixing the rate base, it must logically follow that the expense of carrying that nonproductive acreage may not be considered as a part of the

maintenance of the system which has at its command other acreage which is actually producing gas and is therefore used and useful. The commission is in harmony in disallowing as an expense of the company delayed rentals, but is of the view that when this nonproductive acreage is brought into production that the cost incurred in carrying it through its nonproductive period may then well go into its valuation, and be capitalized.

Depreciation and Amortization

The proper treatment of this charge against the income of the company presents a most difficult question which can not be determined with mathematical precision but must finally rest upon sound judgment guided by such information as may be gleaned from the record. Depreciation proper concerns the life of the plant as affected by agencies which, operating usually through a period of years, will ultimately reach a point requiring the replacement of the plant or certain parts thereof. Section 499-8, [fol. 228] G. C., relating to the valuation of property to determine a just rate, provides:

"Depreciation, if any, from the new reproductive cost as of a date certain for existing mechanical deterioration, for age, for obsolescence, for lack of utility or for any other cause, * * *."

Section 614-49, relating to a depreciation account, provides:

"The charge for depreciation shall be such as will provide the amount required over and above the cost and expense of maintenance to keep the property of the public utility in a state of efficiency corresponding to the progress of the art or industry."

Section 614-46, under which this case is being tried, provides that a fair price shall be fixed with due regard

"to the necessity of making reservations from the income for surplus, depreciation and contingencies * * *."

Depreciation correctly applied would affect only the mechanical parts of the property as indicated by these statutes and is ordinarily ascertained either by observation or esti-

mate, based upon the life of the property under investigation.

Considering the mechanical parts of the property it is quite apparent that no fixed per cent of depreciation could be made to apply indiscriminately to all of the property involved in this case for the reason that the elements involved in depreciation do not act uniformly upon all classes of property. There is some upon which there is no depreciation. Another portion of the plant may consist of pipes [fol. 229] laid within territory subject to electrolysis, acidity of soil, vibration of heavy vehicles, corrosion, damage arising from street repairs and from contact with underground equipment of other utilities. These elements existing in a city are not present to the same extent in rural territory where pipes pass through virgin soil over rights of way not subject to the deterio-ating influence incident to a city plant. A long gas line used for the purpose of transporting gas is subject to a few influences causing depreciation. There is, however, certain of the equipment of a gathering and transmission plant subject to heavy depreciation which would involve the working parts of high powered engines and compressing machinery used for the gathering and propulsion of gas through long transmission lines. It will thus be seen how difficult it is to ascertain a just flat rate for depreciation of the physical property of a plant so extensive as the one under consideration.

Amortization

In addition to the physical depreciation of the property we have also the difficult question of an amount proper to allow for depletion of the gas-bearing lands. When a well is drilled which produces gas it requires expensive equipment, including casing and other apparatus incident to its effective operation. Each well must be attached to a gathering line, often of considerable length, through which the gas passes to the transmission line.

The average life of gas-bearing lands in Ohio is seven and one-half years, and as gas ceases to flow from any [fol. 230] well in paying quantity, the land, the well, its equipment becomes almost valueless. The hole in the ground of course is a total loss as is the acreage it was designed to drain. The casing can be pulled for use at other points but the expense incident thereto makes it of

little value. It may well be that the compressing stations and transmission lines will become useless as a field is exhausted, although we are of the opinion that transmission lines will be useful for many years beyond the period in which any particular gas producing land becomes valueless through depletion.

While there is no statutory provision covering the item of depletion, yet it is apparent that it should be treated substantially in the same manner as depreciation defined by the statute, and we may designate it rather inaccurately as "amortization."

There has been a long line of decisions touching the question of reserve for depreciation and how the same should be treated.

For some time the controversy centered about the question as to the consideration to be given to a reserve for depreciation which was either greater or less than that actually required. It was claimed on the one hand that such excessive reserve belonged to the rate-payer or that at least he should receive the benefit of the same in fixing a just rate; and on the other hand it was claimed by the company if the reserve was not sufficient that that fact should redound to its benefit. It, however, has been definitely established that if the amount paid by the rate-payer is in excess of that required by the company, the excess [fol. 231] belongs to the company, and if the payment has been less than the requirements of the company, the company must bear the loss. The law does not require the company to give up for the benefit of future subscribers any part of its accumulations from a past operation. Neither can the company claim that past losses may be used to support a claim that rates for the future should be increased.

While these are established principles, there is a definite relation between past accumulations from reserves and proper allowance for the future. In the case of Smith v. The Bell Telephone Company, 282 U. S., 133, (75 L. Ed. 255), it was held

"10. The allowance for depreciation entering into the ascertainment of the rate base of a public utility may be based upon past experience, and should not be continued if shown by such experience to be excessive.

"11. Results shown under comparable conditions by other utility companies similarly situated, together with past experience of the company in question, should afford a sound basis for judgment as to the amount which should be allowed as an annual charge for depreciation in fixing a rate base."

Chief Justice Hughes, in delivering the opinion of the court, said:

"While it has been held by this court that property paid for out of the moneys received for past services belongs to the company, and that the property represented by the credit balance in the reserve for depreciation can not be used to support the imposition of a confiscatory rate, it is evident that past experience is an indication of the com-[fol. 232] pany's requirements for the future. The recognition of the ownership of the property represented by the reserve does not make it necessary to allow similar accumulations to go on if the experience shows that these are excessive. The experience of the company * * * should afford a sound basis for judgment as to the amount which in fairness both to the public and the private interest should be allowed as an annual charge for depreciation."

The books and accounts of the company disclose that over a period of years the company has kept records in which it sets up the book value of its property; the amount reserved for depreciation, and the amount reserved for amortization. The books carried a credit balance at the end of 1923 of $917,177.00 for depreciation, and on the same date $623,892.00 for amortization. These reserves have been built up through the intervening years until the thirty-first of December, 1930, when the depreciation reserve amounted to $18,947,910.00 and the amortization to $2,037,-862.00, a total for the two items of $20,985,772.00. These figures include the years immediately preceding the filing of the complaint now under investigation and one year subsequent thereto. They may be taken as a fair estimate by the company of the two items as disclosed by their books. The figures include the reserve for the distribution system, but do not definitely state what portion of the depreciation and amortization items are applicable to distribution property, which should of course be excluded except that prop-

city allocated to the distribution system in Columbus. A close examination of the property of the company which is [fol. 233] devoted to distribution and to which the two reserves should not apply, leads to the conclusion that there should be deducted 16% of the entire depreciation reserve, leaving a balance of approximately $16,000,000.00 as a book reserve for depreciable property exclusive of the distribution system. We may assume that the company in setting up a reserve for amortization excluded property not affected by the elements that go to make up a proper amortization, and we therefore do not deduct the 16% representing the distribution system. This leaves a total of $17,985,300.00 as representing the two reserves for depreciation and amortization.

The book reserve necessarily involves some question of judgment exercised by the company over a period of years as to how much should be properly set aside for the two items. While the books disclose a reserve for the two items of $17,985,300.00, an estimate of these two items based upon reproduction value of the depreciable items, less observed depreciation, totals $26,000,000.00. The figures set up on the books of the company and that arrived at by theoretical reproduction and depreciation are based upon entirely different considerations which would make it impossible that the same figures could be reached by each method. The figures arrived at through appraisement as compared with those arrived at through an examination of the books show an excess of approximately $8,000,000.00 as disclosed by the appraisal which would indicate that the company has set up on its books a sum less than actual experience indicated should have been set up. One witness for the city [fol. 234] allowed an annual reserve charge of 3.6% per year for both depreciation and amortization, and another witness, 2.25%. Counsel for the city say on page 346:

"In the light of the experience of Ohio Fuel as shown by these figures, Blundon's total annual reserve charge of 3.6% per year amounting to $2,848,301.74 is a generous allowance."

And on page 345,

"In view of this experience of the Columbus company relative to depreciation reserve and depreciation charge

the annual allowance for the purpose of this case can not in any event exceed Allensworth's 2.25% which would produce $97,533.50."

The Ohio Fuel Company under its set-up claims an annual depreciation allowance of $1,420,241.00 and for amortization an annual allowance of $5,449,221.00, a total annual charge of $6,869,462.00. The question of depreciation as presented by each side to this controversy will be found in company's brief, page 69, et seq., and in city's brief, page 342, et seq. As against the claims of each party the concurring commissioners, with the assistance of the commission's engineers, have arrived at the conclusion that 1½% of the present value of the depreciable property, being all of the physical property with the exception of lands and rights of way, would correctly represent the average amount that should be set aside for depreciation reserve. This amount produces $667,612.00. As to amortization we have considered the evidence disclosing that the average life of an Ohio well is seven and one-half years. The depreciation [fol. 235] estimated from present rock pressure of each well discloses that there is at this time a depreciation of 58.1126%, leaving the present value of these items of 41.8874% of the original value of the leaseholds.

Considering the present condition of these wells the remaining life expectancy is an average of three years and two months. We have considered that accounts 211, gas well construction, and 212, gas well equipment and leaseholds, are all subject to the proper amortization for the reasons already set forth. Considering the present value of the three items in reference to the remaining life expectancy we find that the annual amortization should be $4,158,954.00. The two items of depreciation and amortization amount annually to $4,826,566.00.

These allowances should be devoted to the purposes of depreciation and amortization alone and if necessary to be invested they should be invested in compliance with the statute and must not be devoted to any other purpose or used for paying dividends. If they are so conserved and used they will afford a fund from which the company may from time to time draw funds sufficient to keep the plant in effective operation. If the funds should be appropriated to other purposes, the time might well arrive when the com-

pany may not have available, and may not be able to obtain the necessary capital to restore depleted property.

[fol. 236] Going Concern Value

One of the lesser questions relates to going concern value asserted by the company and set up in the valuation of its property. We speak of this as one of the lesser questions because it seems to us it has been so frequently discussed that a detailed examination is now uncalled for. However, the Commission was confronted with an array of witnesses testifying to the fact that there was a value inherent in each of these companies under investigation designated as going concern value and variously estimated at from 10 to 15 per cent of the physical value of the several properties. The witnesses as to this elusive element of value had each a separate formula by which he estimated the amount that should be added to the physical valuation of the property as "going concern value." Broadly it may be said that they asserted that in order to convert the bare bones of the physical property into a revenue producing entity it was necessary to attach the rate payer, which necessitated the training of an efficient personnel, the seasoning of the pipe lines, and the general promotion of the business which finally resulted in a revenue producing property.

It was also asserted that it was necessary to overbuild the property and that, until the requisite number of consumers were attached there was a loss to the company which should be covered by an allowance of a per cent for going concern. This value was generally placed at 10 per cent of the physical property. One witness arrived at this value by giving consideration to the value placed by insurance [fol. 237] companies upon the lives of executives of corporations seeking insurance. One witness finally summed up the matter by stating that if there were fifty engineers giving testimony as to the foundation for going concern value there would be fifty different answers. It is quite manifest that the many reasons given by the experts as to why a going concern value should be added to the physical value of the property within the city of Columbus does not obtain as to the production and transmission system, as each of these was built for the definite purpose of supplying customers already secured and we feel that there is not justification for adding going concern value to the produc-

tion and transmission system. As we have before had occasion to state, if there was any definite cost to the company in doing those things which are so ingeniously developed as being the possible element of cost in the reproduction of the property, we would be inclined to allow them as a proper element of value, but we are not impressed with the fact that a going concern value amounting in the aggregate to millions of dollars can be built up on a theory that expenses are to be incurred after the property has been reproduced which were not, as a matter of fact, incurred in the original construction of the property. We cannot conceive that there would be any expense of attaching business to a producing pipe line company which has been built for the sole purpose of supplying already existing customers, nor are we impressed with the cost incident to training personnel, as the business of producing, transporting [fol. 238] and distributing gas has been so long in operation that an abundant supply of well trained personnel is always at the command of the company and in these times there is probably a considerable over-supply.

It may be quite true that after a considerable number of consumers have been attached to a distribution line that certain costs would be incurred in attaching a small group which had not been persuaded of the convenience and advantage of a gas service. It may be noted in passing that it was necessary to compel the company by mandatory injunction to extend service to a group which was not only willing but anxious to become customers of the company.

While we are still discussing the property of The Ohio Fuel Gas Company all that we say here is equally applicable to The United Company and to The Columbus Gas & Fuel Company, the distributing company.

The Supreme Court of Ohio has frequently sustained the commission in its disallowance of going concern value. See Cleveland Illuminating Company v. Public Utilities, 98 O. S. 462; Cincinnati Gas & Electric Company v. Public Utilities, 96 O. S. 554; Lima Telephone Company v. Public Utilities Commission, 98 O. S. 110; Cincinnati v. Public Utilities Commission, 113 O. S. 259; Hardin-Wyandotte Lighting Company v. Public Utilities Company, 118 O. S. 592, and other cases not necessary to cite.

[fol. 239] Pipe Line Prices

Another rather minor difference between the estimate of the company and that of the city arose from a different treatment of prices of pipe, the city's witness testifying to a price less than that asserted by the company. We have gone into this matter in detail and find that the city's testimony upon this point is not as trustworthy as that produced by the company as there are several manifest errors in the city's estimate, among which might be noted the fact that the city's witness adopted the pipe prices used by the company's engineers in the United Fuel case as of December 31, 1928, and applied them to the construction of The Ohio Fuel Company as of December 31, 1929, when pipe prices were higher on the open market. He also priced a character of pipe that was not, as a matter of fact, used in The Ohio Fuel Company construction, using a pipe of less tensile strength and of less cost. The commission is in harmony upon this point.

There are a number of other minor differences between the company and the city in the cost of construction of The Ohio Fuel Company property including the production and transmission system. The differences which produce rather large figures when considering the entire system are minimized when it is realized that only 11.1147 per cent of the entire property is allocated to the Columbus gate rate.

[fol. 240] The Cost of Financing

Another point of difference between the company and the city is whether or not the commission should allow as part of the base rate the cost of financing, the contention being centered upon the question as to what should be regarded as the cost of financing and what as a discount upon securities sold. The statutes of Ohio do not contemplate the cost of gathering together the money necessary to construct the public utility. When the commission is directed to ascertain the cost of building a given plant the statute has reference to the actual money to be expended for that purpose and does not contemplate that there should be an allowance for gathering together the money.

The commission has also excluded the value of certain work in progress and property not used and useful.

General Overheads

This item of expenditure calls for the exercise of judgment and cannot be based on any definite figures and has produced a wide variance between the engineers for the company and those for the city. Without going into detail it may be stated that Ford, Bacon and Davis, the engineers for the company, have set up an average general overhead of 21 per cent., using 7 per cent. interest during construction. We are unable to agree with this estimate of general overhead but have adopted as more reasonable 14 per cent. [fol. 241] which covers the items of engineering and administrative expense during construction, law expense, interest during construction and omissions and contingencies. We feel that the per cent. that we have allowed is ample to cover these items.

Working Capital Including Material and Supplies

Another item in which there is a considerable difference in judgment is the amount necessary for working capital, including material and supplies. The company asserts that this amount should be $3,700,000.00 while the city claims $1,500,000.00, in spite of the fact that its own witness Blundon has adopted the working capital figure of the company, to wit, $3,700,000.00. The company bases its estimate (Exhibit 45, page 26) upon what it claims as the amounts shown on the book for material and supplies on hand as of December 31, 1929, and a reasonable allowance for cash in the bank together with an amount sufficient to provide for approximately two months' average operating expense and the average cost of gas purchased in one month. We are inclined to the view that neither figure is correct. Analyzing the company's claim we would eliminate the amount shown by the books for the material and supplies on hand but which are to be used for distribution plants and not for replacements on either the production or transmission lines. Manifestly it would be improper to allow them working capital to cover distribution system in which the city of Columbus has no concern. We feel that the amount of cash necessary should be limited to one and a half months [fol. 242] rather than two and that the cost of gas purchased from The United Fuel Company should also be eliminated. Making these deductions we have arrived at the figure of

$2,690,132.00 as the proper working capital including material and supplies on hand, 11.1147 per cent. of which is allocated to Columbus.

Allocation at the Columbus Gate

Having determined the value of The Ohio Fuel Company and The United Fuel Company, an important question arises as to the proper allocation to the gateway of Columbus of the property used and useful in distributing gas over the entire system of these two companies. As to The United Fuel Gas Company, we have allocated all that portion of the property that is devoted to the uses of Ohio and Kentucky and have established the gate rate based upon the portion of the gas that flows through the gateway at the river into the pipe of The Ohio Fuel Gas Company to be distributed over the state of Ohio. The Ohio Fuel Company has a widely extended producing and gathering system throughout the state, being active in every well defined gas belt. Collecting gas as it does in every remote portion of the state the same is conducted through distribution pipes and serves many municipalities either directly or through its affiliated distributing companies. In some cases The Ohio Fuel Gas Company sells its gas at a contract rate to non-affiliated companies.

At first blush one might say that the city of Columbus was not concerned with any other property of The Ohio [fol. 243] Fuel Company than that which directly served it and that in computing the value of the property devoted to its service there must be excluded all other producing and transporting lines within the state which cannot be directely linked with it.

The evidence clearly established that the system operated by The Ohio Fuel Company is built upon the plan that gas wherever produced is subject to be distributed to any point in the state where it may be required. Gas from the northern part of the state may be consumed in the southern and gas from West Virginia may be distributed to any of the numerous gateways in Ohio. So it is with gas purchased by the company. The difficulty that confronted the Commission was to ascertain by some reliable evidence how much property was actually devoted to the service of Columbus. Owing to the method of conducting the enterprise it is absolutely impossible to say that one pipe line or one

well may be devoted to Columbus and that another pipe line or well may not be. As a matter of fact, gas is produced or purchased wherever available and transported in a system of interlocking pipe lines to the point of consumption and it may be broadly said that the entire system within the state of Ohio has, at some time and to some extent been devoted to the service of every municipality served by the company.

Two methods of solution were suggested; the city contends that production property should be allocated upon the basis of sales but that the transmission property should be allocated to the particular market upon a basis of mile-
[fol. 244] age, but depending upon peak demands of any locality served. The company, on the other hand, contends that there can be no definite allocation of either the production or transmission property to any one consuming district upon any other basis than that of the gas consumed in that particular locality. Testing out the two theories it soon developed that the contention advocated by the city would result in highly different gate rates to communities which might be in close proximity. If the allocation of the property is measured by the gas consumed all communities bear an equal burden of a gateway price and there can be reasonaable harmony as to the gateways of the several cities. Economically considered, we are of opinion that a substantially similar gateway price in each community would work to the welfare of our state rather than having one city which might enjoy a comparatively low rate while some other city might bear a high rate. This difference in gas rates between different cities might result in an unjust preference to the manufacturer and to the home owner in one city over those in another. Aside from this economic situation, it is practically impossible to allocate to the gateway of Columbus property used and useful for furnishing gas in any other method than that suggested by the company.

The cities of Ohio should be permitted to use the entire system at substantially the same gate rate. What it may cost to distribute the gas within a given municipality after it passes the gateway is a local matter and may vary somewhat in each municipality. We have, therefore, unani-
[fol. 245] mously reached the conclusion that producing and transmission properties should be allocated to the

gateway of Columbus in proportion to the gas consumed by Columbus bears to the entire volume of gas delivered throughout the system. It is estimated that the gas consumed in Columbus is 11.1147 per cent of all the gas produced within the territory under examination and the allocation of the expenses will be in accordance with this judgment.

The Columbia Engineering and Management Corporation

As heretofore stated in our opinion, we desire to make a brief reference to The Columbia Engineering and Management Corporation which was organized for the purpose of furnishing managerial and engineering service to the various companies associated with and subsidiary to The Columbia Gas and Electric Corporation. This corporation entered into two contracts with each related company, one for executive management, for which a charge of 2 per cent to 2½ per cent of the gross earnings of the company plus traveling and incidental expenses was made. In addition to the managerial contract there was one for engineering services in connection with the operation and development of the several companies for which a separate charge was made for the salary to the engineers. The per cent charge was made on the gross earnings of the several companies as its gas passed from one company to another or to the consumer. The development of this company, out [fol. 246] of the surplus, from one having a capital of $100,000.00 to one having a capital of $1,000,000.00 was rapid and dividends were paid which were exorbitant when compared to the capital actually paid in. There is attached to this company a considerable group of executives of high standing in the gas industry to whom salaries were paid entirely out of harmony with the services that they could possibly have rendered and out of harmony with decreased income of the present time. We feel that the operation of such a company and its use in drawing from the company large sums of money is entirely discredited and should no longer be practiced.

We are of opinion that the managerial contract by which this company drew from each of the several companies a per cent of their gross earnings upon the sale from one to the other and finally to the consumer of the same gas imposes an unjustified burden upon the ultimate consumer.

We have corrected this claim for expenses, allowing only that which we think would justly pay for the services actually rendered.

The Rate of Return

Another important matter that confronts us in what is the proper rate of return to be allowed to the gas company after it has applied a portion of its income to the various expenses that have been allowed by the commission. The standard and long followed rule is announced by the Supreme Court in the case of Bluefield Waterworks and Improvement Company v. Public Service Commission of West [fol. 247] Virginia, 262 U. S., 679; 67 Law Ed., 1176:

"5. A public utility is entitled to such rates as will permit it to earn a return upon the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties, but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures.

6. The return on investment which a public utility should be permitted to earn should be reasonably sufficient to assure confidence in the financial soundness of the utility, and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise money necessary for the proper discharge of its public duties.

7. Six per cent. is too low to constitute just compensation * * *."

This puts up to the commission a test which, under the present depression, is different from any that has heretofore confronted us. In prosperous times 7 and 8 per cent. and even more were allowed. A gas company is a more hazardous undertaking than is a water company or power company because its whole existence depends upon the continuance of a gas supply and therefore it might be justly said that such a company would be entitled to a greater rate because of the greater risk involved.

However, gas seems now to be such an assured product that for the purpose of the present consideration it may

[fol. 248] be regarded almost as reliable as water supply. The test of "equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings" presents a new question on account of the present depression. Many other business undertakings at this time in this community are making nothing, but it would be manifestly unlawful for us to say that, due to this fact, this business should be required to serve without a fair return. Giving the matter our serious consideration we have determined that a present rate of income of 6% per cent should be allowed to each of the three companies involved and that their legitimate expenses should be computed on that basis.

There are quite a number of other minor matters upon which there has been a difference between the company and the city but their effect upon the city rate is so inconsequential that we will not take space to note them but they will be reflected in the exhibits attached hereto and made a part of this report.

Taking into consideration all the elements and figures to which we have called attention, we find that the proper gate rate for the city of Columbus is 39.02 cents which we fix for the purpose of the gateway at 39 cents.

The Columbus Gas and Fuel Company Retail Rate

As in the case of the other companies, there is a wide divergence between the claim of the company and the claim of the city. The company claims the value of the distribution plant within the city gates to be $5,364,599.00 while the city asserts that the value is $3,555,510.00. The dis- [fol. 249] tribution plant in Columbus, while extensive, is by no means comparable in value, for intricacy of pipe lines, with those that attach to the two producing and transportation companies and most of our changes and eliminations in reference to that company will appear by an examination of the figures shown in the attached exhibit.

Controversy between the Company and the City centered about the usual differences, among which were reconstruction cost, depreciation, present value, going concern value, overheads, cost of labor, construction expenditures, property "used and useful" concerning all of which our conclusions are reflected in the exhibits.

The value of general office equipment, with observed depreciation, will be accepted, as will the value fixed by the company on general shop equipment and general garage equipment. Undistributed construction expenditures will be allowed in the sum of 12½ per cent on the valuation found by the commission of the physical property. Working capital will be allowed in the sum of $[illegible]. Going concern value will be disallowed. The condition of the property as testified to by the company seems more accurate than that testified to by the city's witnesses.

The difficult questions of depletion of gas reserves which gave the commission so much concern in the producing company do not arise in the case of the distribution plant within the city gates and we will allow 1½ per cent on the value of the Columbus property excluding lands, working capital, material and supplies and garage equipment for depreciation.

The abandonment of certain lines by the company have been given proper consideration and asserted expense for claims has been disallowed on the theory that this is a capital expense and has heretofore been included in the

The block rates proposed by the company would in practice result in a service charge although not so designated there is however, no proper objection to a reasonable minimum charge, and the commission has concluded to follow the ordinance in fixing [illegible] cents as a minimum per month per customer from which there shall be no discount, and 10 cents for each thousand cubic feet consumed through each meter per month with the penalties provided in the ordinance.

[illegible] of New Hope

The customers in Columbus are interested in knowing to what extent their bills may be increased under the rates now allowed by the commissioners. There are a total of approximately [illegible] consumers in the city, of these [illegible] use [illegible] cubic feet or less, and the new rate will make no increase upon them. [illegible] use [illegible] cubic feet per month, and each of these will pay 10 cents per month as [illegible]

[illegible] will pay 1 cents increase, [illegible] will pay 2 cents increase, [illegible] will pay 3 cents increase, [illegible] will pay 4 cents increase, [illegible] will pay 5 cents increase, [illegible] will pay 6 cents increase, [illegible] will pay

The remaining 20% are confined to large consumers, none of which are industrial, where the company is in competition with other sources of fuel.

It will thus be realized that a very slight increase in the rate charged to a large number of individual consumers will meet the increase we have found necessary to recommend.

Columbus consumers have been enjoying one of the lowest rates in the state of Ohio. While the new rate makes a slight increase here, if the gain rate established in this proceeding becomes in a measure a standard for other gain rates other communities will enjoy a substantial decrease in the amount that they are now paying for gas.

Other Matters to Be Regarded

It will be observed that under the statute applicable to this case the commission is given more discretion in correcting an ordinance rate than it can exercise under the more rigid rules provided by Section 499-8, et seq., controlling its consideration of cases not arising under ordinances. The statute under which we are now operating provides that the commission in fixing a just rate shall have due regard to the value of all the property of the utility "used and useful" and to its necessity for making certain [illegible] reservations. It also provides that it shall have regard for "such other matters as may be proper, according to the fact in each case."

While the commission has arrived at its judgment as to what is a just rate by observing the more rigid rules provided by the statute, its conclusion that the ordinance rate should be advanced might well be justified by a proper regard of other matters incident to this case.

Prominent among these is the matter of service. We are convinced that a community is as much interested in efficient service as it is in a small advance in price. If the retention of the old 48 cent rate would require that the company curtail its present excellent service due to lack of sufficient funds the rate payer would be more dissatisfied than by the small increase, which will enable the company to continue its present service.

Another matter that might well engage the consideration of the commission is that the common stock of the holding company has been widely distributed to small in-

[illegible] whose securities might be jeopardized if oppressive regulations were imposed upon the operating companies. The commission in this case has eliminated objectionably excessive profits going to small groups through the instrumentality of closely controlled corporations. While no doubt there are some high salaries paid to those connected with all the affiliated companies, yet the basic securities upon which the dividends are paid are distributed to a large number of investors in comparatively small amounts. These securities should not be jeopardized.

Control of Utilities

[illegible] are established throughout the nation to control public utilities.

An unregulated or [illegible] regulated public utility, whose only thought is to secure as large an income from its patrons as the traffic will bear, may become a public menace.

A [illegible] regulated company, which is allowed only such income as will sustain its activities to bare necessities will not be able to afford to the public the service and security which it demands.

[illegible] regulations may result in strangulation.

A [illegible] regulated utility can be made the efficient servant of the people, furnishing to them desirable commodities at a fair price both to the consumer and to the investor.

The investor naturally wants as large an income as possible and the consumer as low a rate as possible.

Between the investor and consumer a regulatory body must, [illegible] reconcile, or say, after intelligent examination, to the investor that its rates are too high or to the consumer that he demands too low a rate. If an even balance can be maintained, justice will be done to all.

This has been the constant purpose of this commission throughout a long and tedious trial and with an earnest endeavor to arrive at a just conclusion.

Time Consumed

[illegible] the consideration of this case has consumed a longer period of time than would be required in a case of [illegible] importance. The several members of the commission [illegible] this investigation, reached different conclusions on

many questions, some of which were of major importance, but many of which have slight effect upon the ultimate rate. The concurring members have felt that a duty was imposed on them to reconcile their divergent views wherever the same could be done without a sacrifice of convictions that either may have held concerning fundamental principles. Had each adhered tenaciously to his individual opinion, the case would have resulted in three impotent opinions with no authority to the decision of the commission.

Necessarily the reconciliation of divergent views has consumed time, but we are of the firm belief that the decision arrived at is of far more value than one hastily concluded which would necessarily result in long delays in the reviewing court.

Trial of the Case

The extent and importance of this case, and the thoroughness with which it was tried, can be visualized, to some extent, when it is known that the evidence introduced, mostly by expert witnesses, covered over eleven thousand pages and the exhibits filed numbered more than seven hundred and fifty, many of them complicated tables of figures and computations.

[fol. 259] The briefs of counsel totaled one thousand printed pages, while the oral arguments, in additions, were numerous and comprehensive.

The case was tried most skillfully by expert attorneys, and every question involved was exhaustively discussed.

The commission appreciates the sincerity, earnestness and patience of all counsel during the long trial of this case, and takes the opportunity to thank them for their co-operation in developing every phase of the problem.

Order may be drawn and issued according to this opinion.

[fol. 260]

EXHIBIT A

The Columbus Gas & Fuel Company—Formal Case No. 5935

United Fuel Gas Company—River Rate

Valuation:			
Property devoted to the service of other than domestic and manufacturing customers in West Virginia, exclusive of distribution system property and the proportion of general property applicable thereto, as of 12-31-29.			Portion allocable to Ohio Fuel Gas Co. on M c. f. sales basis
Production system:			
Land	$1,234		$447
Rights of way	214,340		77,648
Plant and general overheads	14,207,333		5,146,805
Total		$14,422,907	$5,224,900
Transmission system:			
Land	$16,270		5,894
Rights of way	294,725		106,768
Plant and general overheads	14,206,244		5,146,411
Total		$14,517,239	$5,259,073
General property:			
Land	$145,205		$52,603
Plant and general overheads	538,635		195,128
Total		$683,840	$247,731
Total physical property		$29,623,986	$10,731,704
Leaseholds		6,796,213	2,462,023
Working capital and materials and supplies		1,001,913	362,957
Total property used and useful		$37,422,112	$13,556,684

[fol. 261]

Expenses and return on investment:			
Proportion applicable to the above property for 1929.			
Gas purchased for resale		$1,520,431	$550,798
Production expense		1,678,480	608,053
Transmission expense		942,507	341,436
General expense		407,491	147,619
Taxes		893,788	323,787
Interdepartmental		*329,362	*119,316
Depreciation and amortization		1,877,282	680,071
Return @ 6½%		2,432,437	881,184
Total expenses and return		$9,423,054	$3,413,632
M c. f. of gas sold:			
Proportion applicable to the above property for 1929.			
Wholesale sales		39,536,161	15,486,218
Retail sales—Ohio	1,352,473		
Retail sales—Kentucky	1,859,807	3,212,280	
Total M c. f. of gas sold		42,748,441	15,486,218
River rate per M c. f.:			
Derived by dividing the total expenses and return by the total M c. f. of gas sold		22.04¢	22.04¢

* In red.

Columbus Distributing Expense

Considering all the evidence both as to the value of the property and the expense properly allowable for the conduct of the business within the Columbus gate we have decided [fol. 262] to amend that the proper allowance to be made for the service rendered by The Columbus Gas and Fuel Company in the distribution of gas to the consumers in Columbus is 8c per thousand cubic feet

[fol. 262] EXHIBIT B

Sheet 1

The Columbus Gas & Fuel Company—Formal Case No. 5935

The Ohio Fuel Gas Company—Gate Rate

Valuation:

		Portion applicable to Cols. Gas & Fuel Co. on M c. f. sales basis
Property devoted to the service of Columbus, Ohio, and other cities in Ohio and Indiana, exclusive of distribution system property and the proportion of general property applicable thereto, as of 12-31-29.		
Production system	$13,140,755	$1,460,559
Transmission system	42,404,329	4,713,123
General property	1,089,344	121,078
General overheads	792,820	881,266
Total physical property	$64,563,248	$7,176,026
Leaseholds	7,284,900	809,696
Working capital and materials and supplies	2,690,132	299,001
Total property used and useful	$74,538,280A	$8,284,723

Expenses and return on investment:

Proportion applicable to above property for 1929.		
Purchased gas—from U. F. G. Co. @ 22.04¢ per M c. f.	3,413,162	379,363
Purchased gas—from others	2,873,056	319,332
Purchased gas expense	89,747	9,975
Production expenses	1,288,588B	143,223
Non-productive well drilling expenses	618,789	68,777
Transmission expenses	1,401,668B	155,792
General administrative expenses	391,979B	43,567
Other general expenses	199,347B	22,157
Taxes	1,742,310B	193,653
Credits	782,358*	86,957*
Depreciation and amortization	4,826,566	536,459
Return @ 6½%	4,844,988	538,507
Total expense and return	$20,907,842	$2,323,848

[fol. 263]

M c. f. of gas sold:		
Proportion applicable to the above property for 1929	$53,579,575	$5,955,221
Gate rate per M c. f.:		
Derived by dividing the total expenses and return by the total M. c. f. of gas sold	39.02¢	39.02¢

NOTE:
A—Detail of valuation shown on Sheet 2.
B—Detail of expenses shown on Sheets 3 and 4.
* In red ink.

Exhibit B—Sheet 2

The Columbus Gas & Fuel Company—Formal Case No. 5935

The Ohio Fuel Gas Company

Detail of Valuation as of 12-31-29

	Reproduction value	Percent condition	Present value
Production system property:			
204 Land	$20,514	100.0000	$20,514
206 Rights of way	115,508	100.0000	115,508
208 Gas well structures	343,382	80.0001	274,706
210 Other production system structures	162,136	85.9772	139,400
211 Gas well construction	14,192,077	41.8874	5,944,692
212 Gas well equipment	9,715,175	41.8874	4,069,434
213 Field line construction	774,475	85.0000	658,304
214 Field line equipment	1,801,912	85.0000	1,531,625
216 Drilling & cleaning equipment	545,401	70.0000	381,781
217 Other production system equipment	5,612	85.3706	4,791
Total	$27,676,192	47.4804	$13,140,755
Transmission system property:			
218 Land	67,818	100.0000	67,818
220 Rights of way	1,797,299	100.0000	1,797,299
[fol. 264]			
221 Compressor station structures	1,076,486	84.3126	907,613
222 Transmission system measuring station structures	129,629	79.9998	103,703
223 Other transmission system structures	234,167	81.1382	189,999
224 Compressor station equipment	6,294,007	84.2072	5,300,007
225 Transmission system measuring station equipment	496,891	90.0002	447,203
226 Transmission line equipment	40,541,891	82.5000	33,447,060
227 Other transmission system property	168,708	85.1335	143,627
Total	$50,806,896	83.4618	$42,404,329
General property:			
244 General office land	$108,906	100.0000	$108,906
245 Other general land	2,757	100.0000	2,757
247 General office structures	284,045	97.0001	275,524
248 Other general structures	81,595	79.6385	64,981
251 General shop equipment 256 General tools & equipment	104,477	79.7640	83,335
253 General garage equipment	367,339	82.0868	301,537
254 General laboratory equipment	11,201	70.4491	7,891
255 General telephone & telegraph equipment	173,529	73.9427	128,312
Total	$1,265,994	86.0465	$1,089,344
General overheads:			
258 to 266 Undistributed construction expenditures	11,164,871	71.0158	7,928,820
Total physical property	$90,913,953	71.0158	$64,563,248
Leaseholds	7,284,900	100.0000	7,284,900
Working capital and materials and supplies	2,690,132	100.0000	2,690,132
Total property used and useful	$100,888,985	73.8815	$74,538,280

[fol. 265] Exhibit B—Sheet 3

The Columbus Gas & Fuel Company—Formal Case No. 5935

The Ohio Fuel Gas Company

Detail of Expenses for 1929

	Production expenses:	
350	Superintendence labor	$49,293
351	Gas well & field line labor	392,671
353	Other production system labor	30,353
353½	Land & map department labor	80,414
354	Superintendence supplies & expenses	4,342
355	Gas well & field line supplies & expenses	69,263
357	Production system rent	3,353
358	Other production system supplies & expenses	9,016
358½	Land & map department supplies & expenses	13,036
359	Gas well royalties	538,206
362	Maintenance of other production system structures	1,589
363	Maintenance of gas well equipment	53,868
367	Maintenance of drilling & cleaning equipment	40,454
368	Maintenance of other production system equipment	2,730
	Total	$1,288,588
	Transmission expenses:	
371	Superintendence labor	$48,465
372	Compressor station labor	349,705
373	Measuring station labor	19,888
374	Transmission line labor	180,253
375	Other transmission system labor	24,366
376	Superintendence supplies & expenses	5,679
377	Compressor station supplies & expenses	68,729
378	Measuring station supplies & expenses	10,592
379	Transmission line supplies & expenses	53,963
380	Transmission system rent	133,860
381	Other transmission system supplies & expenses	4,307
382	Maintenance of compressor station structures	22,543
383	Maintenance of other transmission system structures	1,108
384	Maintenance of compressor station equipment	140,043
385	Maintenance of transmission line equipment	317,237
386	Changing transmission lines	4,681
387	Maintenance of measuring station equipment	15,751
388	Maintenance of other transmission system equipment	498
	Total	$1,401,668

[fol. 266] Exhibit B—Sheet 4

The Columbus Gas & Fuel Company—Formal Case No. 5935

The Ohio Fuel Gas Company

Detail of Expenses for 1929

	General administrative expenses:	
427	Salaries of general officers	$11,008
427½	Operating & engineering service fees	186,736
428	Salaries of general office clerks	102,342
429	General office stationery & printing	5,392
430	Other general office supplies	2,989
431	General officers' expenses	5,436
432	General office clerks' expenses	3,425
433	General law expenses	40,426
434	General office rent	17,800
435	Other general office expenses	15,498
437	Maintenance of general office equipment	927
	Total	$391,979

	Other general expenses:	
442	Laboratory labor	$352
443	Telephone & telegraph system labor	3,383
448	Laboratory supplies & expenses	2,213
449	Telephone & telegraph system supplies & expenses	1,819
454	Injuries & damages	63,600
455	Other insurance	22,223
455½	Employees' group insurance	13,600
456	Relief & pensions	35,912
457	Other general expenses	55,758
458	Inventory adjustment	1,229
459	Discounts on material & supplies	4,709*
473	Maintenance of telephone & telegraph system	3,967
	Total	$199,347
	Taxes:	
	Property tax	$857,794
	Ohio excise tax	282,256
	Ohio public utilities commission tax	10,717
	Federal income tax	591,543
	Total	$1,742,310

*Red figures.

[fol. 267] EXHIBIT C

Sheet 1

The Columbus Gas & Fuel Company—Formal Case No. 5935

The Columbus Gas & Fuel Company—Retail Rate

Valuation:

Property devoted to the service of the public within the City of Columbus, Ohio, as of 12-31-29:	
Distribution system	$3,252,344
General property	238,898
General overheads	436,405
Total physical property	$3,927,647
Working capital and materials & supplies	100,000
Total property used and useful	$4,027,647

Expenses and return on investment:

Proportion applicable to above property for 1929:	
Purchased gas—from Ohio Fuel Gas Company @ 39.022 plus per M. c. f. (5,955,221)	$2,323,848
Purchased gas expense	1,078
Distribution expenses	120,611B
Utilization expenses	28,866B
Commercial expenses	108,799B
Business promotion expenses	23,762B
General administrative expenses	56,263B
Other general expenses	68,524
Taxes	155,959
Minimum charges	*43,980
Discounts & penalties	*34,469
Depreciation	51,154
Return @ 6½%	261,797
Total expenses and return	$3,122,212

Exhibit C—Continued

M. c. f. of gas sold:	
Proportion applicable to above property for 1929	$5,671,630
Retail rate per M. c. f.:	
Derived by dividing the total expenses & return by the total M. c. f. of gas sold	55 049

NOTE:
A—Detail of valuation shown on Sheet 2.
B—Detail of expenses shown on Sheets 3 and 4.
* Red ink.

[fol. 268] Exhibit C—Sheet 2

The Columbus Gas & Fuel Company—Formal Case No. 5935

The Columbus Gas & Fuel Company

Detail of Valuation as of 12-31-29

		Production value	Percent condition	Present value
	Distribution system property:			
228	Land	$23,550	100 0000	$23,550
230	Rights of way	5,072	100 0000	5,072
231	District regulator structures	10,698	89 7457	9,601
232	Other distribution system structures	14,868	98 3992	14,630
233	Gas receivers & district regulators	31,300	96 1502	30,095
234	Distribution line equipment	2,768,637	83 0391	2,299,051
236	Meters	458,902	95 6272	438,835
237	Meter installations			
238	House regulators	16,957	84 9973	14,413
239	Other distribution system equipment	18,990	97 3512	18,487
	Total	$3,864,640	84 1565	$3,252,344
	General property:			
245	Other general land	52,380	100.0000	52,380
248	Other general structures	102,153	99 6897	101,836
249	General office equipment	33,902	86 8179	29,433
251	General shop equipment	18,684	84 2325	15,738
256	General tools & implements			
253	General garage equipment	51,197	77 1744	39,511
	Total	$258,316	92 4829	$238,898
	General overheads:			
258 to 266	Undistributed construction expenditures	515,370	84 6781	436,405
	Total physical property	$4,638,326	84 6781	$3,927,647
	Working capital and materials and supplies	100,000	100 0000	100,000
	Total property used & useful	$4,738,326	85 0015	$4,027,647

[fol. 269] Exhibit C—Sheet 3

The Columbus Gas & Fuel Company—Formal Case No. 5935

The Columbus Gas & Fuel Company

Detail of Expenses for 1929

	Distribution expenses:	
380	Superintendence labor	$10,713
380	Distribution line labor	6,653
381	Labor removing and resetting meters	14,037
382	Labor inspecting & testing meters	256
383	Other meter department labor	2,140
384	Other distribution system labor	4,498
395	Superintendence supplies & expenses	885
396	Distribution line supplies & expenses	7,651
397	Meter department supplies & expenses	15,733
398	Distribution system rent	1,072
399	Other distribution system supplies & expenses	4,893
400	Maintenance of distribution structures	277
401	Maintenance of distribution lines	12,871
402	Changing distribution lines	731
403	Maintenance of service lines	14,392
404	Maintenance of meters	17,698
405	Maintenance of house regulators	36
406	Maintenance of gas receivers & district regulators	4,577
407	Maintenance of other equipment	919
	Total	$120,611
	Utilization expenses:	
411	Customers premises labor	$23,137
415	Customers premises supplies & expense	5,729
	Total	$28,866
	Commercial expenses:	
420	Operating labor	$87,332
421	Operating supplies & expenses	21,467
	Total	$108,799
	Business promotion expenses:	
422	Salaries & wages	$6,711
424	Supplies & expenses	17,051
	Total	$23,762

[fol. 270] Exhibit C—Sheet 4

The Columbus Gas & Fuel Company—Formal Case No. 5935

The Columbus Gas & Fuel Company

Detail of Expenses for 1929

	General administrative expenses:	
427	Salaries of general officers	$2,989
427½	Operating & engineering service fees	39,845
428	Salaries general office clerks	4,538
429	General office stationery & printing	1,743
430	Other general office supplies	205
431	General officers expenses	653
432	General office clerk expenses	21
433	General law expenses	2,356
434	General office rent	1,204
435	Other general office expenses	2,588
437	Maintenance of general office equipment	121
	Total	$56,263

Exhibit 6 — Sheet 4 — continued

Other general expenses	
443 Laboratory supplies & expenses	$470
452 Uncollectible accounts	6 [illegible]
454 Injuries & damages	25 [illegible]
455 Insurance	4 439
455½ Employees group insurance	2 091
456 Relief & pensions	5 [illegible]
457 Other general expenses	28 [illegible]
458 Inventory adjustments	[illegible]
459 Discount on merchandise purchased	*1 [illegible]
462 Gas used by company	*1 [illegible]
Total	868 474
Taxes	
Property tax	889 565
Ohio excise tax	42 180
Ohio public utilities commission tax	1 698
Federal income tax	22 644
Total	$155 989

*In red ink

[fol. 271] BEFORE PUBLIC UTILITIES COMMISSION OF OHIO

[No. 5935]

In the Matter of the Complaint and Appeal of THE COLUMBUS GAS AND FUEL COMPANY from an Ordinance of the City of Columbus, Ohio, to Regulate the Price That May Be Charged for Natural Gas in the City of Columbus

ORDER OF OCTOBER 3, 1932

This day after full hearing and argument by counsel, this proceeding came on for final consideration upon the complaint of and appeal by The Columbus Gas and Fuel Company from Ordinance No. 645-29 passed by the council of the city of Columbus, Ohio, September 3, 1929, to regulate the price of natural gas in the city of Columbus for a period of five years, the testimony offered and introduced in evidence upon such hearing, and the briefs and oral argument of counsel.

The commission, being fully advised in the premises, having this day made and filed, in writing, its finding of facts and coming first to value the property of said appellant, used and useful for the convenience of the public in the furnishing of natural gas for public and private consumption in the city of Columbus, and after considering the inventories of said property filed herein by said appellant, and

the respondent, the city of Columbus, the evidence and exhibits, and having completed an independent inventory and valuation of said property, finds and ascertains the value [fol. 272] of the several kinds and classes of property of The Columbus Gas and Fuel Company, used and useful for the convenience of the public in the furnishing of natural gas service for public and private consumption in the city of Columbus and of said properties as a whole, as of December 31, 1929, to be the sum of $74,029,84[illegible], as more fully set forth in Exhibit "C" appended to the finding of facts filed herein, which exhibit hereby is made a part of the entry by adoption as fully as if the same were here set forth in its entirety.

To which finding of the commission, the parties hereto, The Columbus Gas and Fuel Company and the city of Columbus, Ohio, each then excepted, here and now except and their exceptions here are noted of record.

And the commission coming now to consider the complaint of and appeal by said The Columbus Gas and Fuel Company from the aforesaid ordinance, and having caused an appraisement to be made and having ascertained and [illegible] determined and having fixed the value of all of the property of the said company, actually used and useful for the convenience of the public in the furnishing of natural gas service for public and private consumption in the city of Columbus, excluding therefrom the value of any franchise, the right to own, operate or enjoy the same, in excess of the amount (exclusive of any tax or annual charge) actually paid to any political subdivision of the state or county as a consideration or the grant of such franchise or right, and exclusive of any value added thereto by reason of a monopoly or merger and having given consideration to the necessity for making reservations from [fol. 273] the income for surplus, depreciation and contingencies, and having taken into consideration all other matters which were deemed proper, the commission further finds:

That the value of all of the property of The Ohio Fuel Gas Company, exclusive of distribution plant, as of December 31, 1929, is the sum of $74,538,280.00, as fully set forth in Exhibit "B" appended to the finding of facts filed herein, which exhibit hereby is made a part of this order by adoption;

That the value of all of the property of The United Fuel Gas Company, exclusive of distribution plant, as of December 31, 1929, is the sum of $37,422,112.00, as set out in Exhibit "A", which exhibit hereby is made a part of this order by adoption;

That the reasonable and just rate to be paid for natural gas by The Ohio Fuel Gas Company to producing companies at the Ohio river when such gas is to be distributed in the city of Columbus, Ohio, is the sum of 22c per thousand cubic feet;

That the reasonable and just rate to be paid for natural gas by The Columbus Gas and Fuel Company to The Ohio Fuel Gas Company at the point of delivery at the city of Columbus, Ohio, is the sum of 39c per one thousand cubic feet;

That the reasonable annual charge to be made by The Columbus Gas and Fuel Company for and on account of necessary appropriations to its depreciation reserve account will be of one and one half per cent of the present value of its depreciable property;

[fol 274] That a reasonable annual rate of return to be allowed The Columbus Gas and Fuel Company for the furnishing of natural gas service in the city of Columbus, Ohio, will be 6½% of the aforesaid value of its property, used and useful for the furnishing of natural gas service in the city of Columbus, Ohio;

That the reasonable costs and expenses of The Columbus Gas and Fuel Company for the furnishing of its natural gas service to consumer within the city of Columbus, Ohio, based upon a consumption of 5,671,639,000 cubic feet of natural gas for the calendar year ended December 31, 1929, were as set forth in Exhibit "C", Sheet 1, appended to the finding of facts filed herein, which exhibit hereby is made a part of this order by adoption;

That, for the same fiscal period, the reasonable operating expenses of The Ohio Fuel Company and of The United Fuel Gas Company were as set forth in Exhibit "B", Sheet 1, and "A", Sheet 1, attached to the finding of facts filed herein, which exhibits are hereby made parts of this order by adoption;

That the rate per thousand cubic feet of 48c, with an additional charge of 5c per thousand cubic feet, if the monthly bills are not paid within a fixed time, with a mini-

[illegible] charge of 75c per month without discount fixed and [illegible] by said ordinance, are unreasonable and unjust and ought not to be ratified and confirmed, and that just and reasonable rates and charges should be substituted therefor.

That the rate per thousand cubic feet of 55c, with an additional charge of 5c per thousand cubic feet, if monthly [illegible] bills are not paid within a fixed time, and a monthly minimum charge of 75c, without discount, are just and reasonable rates and charges for the service furnished and supplied by said appellant in the city of Columbus, Ohio, and

That the gross and net revenues derived by said The Columbus Gas and Fuel Company for furnishing natural gas for public and private consumption, in the city of Columbus, at the rates and charges hereinbefore found by the commission to be just and reasonable will be sufficient to yield said The Columbus Gas and Fuel Company a reasonable compensation for such service.

It is therefore,

Ordered, that the rates and charges hereinbefore set forth which are found and determined by this commission to be just and reasonable for the furnishing of natural gas service by The Columbus Gas and Fuel Company for public and private consumption in the city of Columbus, be, and hereby they are substituted for the rates and charges fixed by said ordinance, which the commission has found to be unjust and unreasonable, and the commission having made inquiry and investigation with respect to the ability of said The Columbus Gas and Fuel Company to furnish natural gas for public and private consumption in the city of Columbus, as fixed by said ordinance, and having found that said The Columbus Gas and Fuel Company will be able to furnish its said product in said city for said period, it is therefore further,

Ordered, that the rates and charges not greater than or [illegible] in excess of the rates and charges for the furnishing of natural gas to the city and private consumers, and to the public buildings, grounds, streets, alleys and [illegible] in the city of Columbus, Ohio, for public and private consumption, which the commission herein has found to be just and reasonable, be, and remain in force and effect for a period of five years from and after the

effective date of the ordinance herein complained of and appealed from, and said The Columbus Gas and Fuel Company hereby is notified, directed and required to furnish its product to its consumers thereof, public and private, in the City of Columbus, Ohio, for said period.

To which order of the Commission, The Columbus Gas and Fuel Company, and the city of Columbus, each then excepted, here now except, and their exceptions here are noted of record.

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fol. 277] BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

No. 5935

In the Matter of the Complaint and Appeal of THE COLUMBUS GAS AND FUEL COMPANY from an Ordinance of the City of Columbus, Ohio, to Regulate the Price That May Be Charged for Natural Gas in the City of Columbus

MINORITY OPINION

On the third of September, 1929, The Council of the City of Columbus enacted Ordinance 645-29, to regulate the price of natural gas in the City of Columbus for a five year period, which ordinance fixed a minimum charge per month per customer of 75¢ without discount, and a rate of 48¢ per each one thousand cubic feet of natural gas consumed, having heat value of not less than 900 BTU per cubic feet, and an additional charge of 5¢ per each one thousand cubic feet of natural gas consumed through each meter each month if the monthly bills are not paid within a fixed time.

This ordinance was approved by referendum vote in accordance with the Charter of the City of Columbus on the 5th day of November, 1929. Thereafter The Columbus Gas and Fuel Company, one of the companies furnishing natural gas to consumers within the City of Columbus, filed its appeal with this Commission, in accordance with the provisions of Section 614-44, claiming that the rate fixed by the Council in the ordinance hereinbefore referred to was unfair and unreasonable and did not provide a sufficient charge to give the company an adequate return upon the value of its property used and useful for the rendering of the service within the City of Columbus and prayed that

the Commission fix a just and reasonable rate allowing the company a fair return upon its used and useful property.

The common stock of The Columbus Gas and Fuel Company, except qualifying shares, is owned by The Columbia Gas and Electric Corporation, the parent company also of The Ohio Fuel Gas Company, which sells gas at wholesale to The Columbus Gas and Fuel Company at the City gates of Columbus, and also of The United Fuel Gas Company, which is a producing company beyond the river and which sells at the Ohio River, gas at wholesale to The Ohio Fuel Gas Company, which gas is co-mingled with the gas produced by The Ohio Fuel Gas Company and also that pur-
[fol. 278] chased from independent producers throughout Ohio and then transmitted by The Ohio Fuel Gas Company to the various points of distribution, in some of which The Ohio Fuel Gas Company sells directly to the consumers and in others such as Columbus, sells directly to a separate distributing company, sometimes inter-corporately related, as in this case, and in other places not so related.

Another subsidiary of The Columbia Gas and Electric Corporation is The Columbia Engineering and Management Corporation, which manages The United Fuel Gas Company, The Ohio Fuel Gas Company and The Columbus Gas and Fuel Company and furnishes to them certain engineering services. A direct charge is made for engineering and 2% to 2½% of the gross earnings charged as the management fee of each subsidiary company.

The company began its case upon the theory that to prove the reasonableness of the gate rate for Columbus, it would only be necessary to show similar gate rates, even though they might largely have been made by interlocked directorates of separate corporations and that in the absence of any fraud shown by the City in the enactment of such a contract or fixing of such a rate, that the gate rate would stand.

In the early history of this case a motion was presented by the City to require the company to present proof of the reasonableness of the charge made at the gate for gas. This motion was sustained by the Commission, and there then began the investigation of property valued at over $115,000,000.00 rather than $4,000,000.00, plus, the value of The Columbus distributing plant.

The case in the Federal Court, which was often referred to during this investigation, assumed a gate rate fixed by contract, which was agreed to by the Company and the City, and therefore that investigation was limited to the value of the distributing property in Columbus.

If the Commission were limited in its investigation to determining the cost of distributing gas in the City of Columbus above the 45¢ gate rate fixed by The Ohio Fuel and The Columbus Company, it is apparent immediately that the ordinance was invalid and likewise easily seen that if this Commission could not investigate the reasonableness [fol. 279] of the gate rate that a higher gate rate also could be fixed than 45¢ and the jurisdiction of this Commission completely circumvented as far as rate making is concerned.

The decision of the Commission in regard to the gate rate was the same as had previously been made in The Dayton Power and Light case by this Commission. Subsequently the rule was finally fixed by the Supreme Court of the United States in the Illinois Bell Telephone case, 202 U. S. 183, wherein the Supreme Court of the United States sustained the jurisdiction of a Federal District Court, and indirectly a Commission, to determine the profits which might reasonably accrue to a related company selling its product to a public Utility and to find the cost of any engineering or management services rendered by the parent company or another subsidiary to a public utility.

The Commission directed, in its order sustaining the motion of the City of Columbus, The Columbus Company to produce testimony and all records showing the profits accruing to The Ohio Fuel Gas Company in the sale of gas to the Columbus Company at the City gates—whereupon, the Commission might fix a reasonable allowance for gate rate chargeable to expenses by The Columbus Company, which would produce no more than a reasonable profit to The Ohio Fuel Gas Company; and to produce evidence showing the cost of the services rendered to The Columbus Gas and Fuel Company by the engineering and management corporation, under its contract.

During the argument in this case the Supreme Court of the United States reiterated its position in a stronger case almost parallel to the instant one, Western Distributing Company vs. Public Service Commission of Kansas, No. 337, decided February 29, 1932.

In that case the propriety of a 40¢ gate rate between inter-related companies was under consideration and therein the Supreme Court said:

"Where, however, they constitute but a single interest and involve the embarkation of the total capital in what is in effect one enterprise, the elements of double profit and of the reasonableness of inter-company charges must necessarily be the subjeect of inquiry and scrutiny before the question as to the lawfulness of the retail rate based thereon can be satisfactorily answered."

[fol. 280] "It is enough to say that in view of the relations of the parties and the power implicit therein arbitrarily to fix and maintain costs as respects the distributing company which do not represent the true value of the service rendered, the State authority is entitled to a fair showing of the reasonableness of such costs, although this may involve a presentation of evidence which would not be required in the case of parties dealing at arms' length and in the general and open market, subject to the usual safeguards of bargaining and competition."

We find in the 1931 Annual Report of the Columbia Gas and Electric Corporation the following:

"As the properties are all thoroughly integrated and interconnected, they constitute a single operating unit."

These two decisions are epoch making in ultility regulation and give to this Commission, in its opinion, full jurisdiction to determine all the facts necessary to sustain or disprove the 45¢ gate rate as a reasonable allowance to The Columbus Company and to substitute for it as a reasonable expense a fair gate rate and in doing this to determine the reasonableness also of the rate charged at the river by The United Company to The Ohio Fuel Gas Company and likewise to determine what shall be allowed as an expense to the related companies in payment for services by The Columbia Engineering and Management Corporation.

Ten years ago in Ohio a similar investigation as this would have brought promptly to issue the question of the supply of gas,—the company contending then as did other companies that the supply was rapidly running out and that there must be consideration given to the amortization of

property and unobserved depreciation allowances, based upon a maximum gas supply of ten years. The company's witnesses in this case state that for all practical purposes the supply of natural gas available for this market is unlimited.

The Commission therefore can approach this problem without giving consideration to the life of the property other than as to those factors resulting from normal depreciation and obsolescence.

There is some contention in this case, upon which the Commission need not pass, that these mains will ultimately be used for the transportation of artificial gas from the coal regions to the present established market, as the natural gas supply wanes.

Ohio is only surpassed by the State of California in the number of consumers of natural gas and The Columbia [fol. 281] System then has here in Ohio the best developed market for natural gas in the world and yet during the progress of this case, the same company or system is engaged in the construction of transmission mains to supply the larger industrial centers of the east.

This Commission is aware of the fact that this gas, under the law, is privately owned and being private property is subject to the use of the ownership to the most profitable purpose to which it can be applied, but the Commission also recognizes and insists upon certain obligations on the part of the company in return for the great system which it has been permitted, under the law, to build up as well as the right of eminent domain given it by the sovereign authorities, to render good service to all alike and at a rate not greater than the reasonable value of the product which will produce a just and fair return to the company for the use of its property.

River Rate

In determining the profits accruing to The Ohio Fuel Gas Company the first question confronting the Commission is that of a reasonable charge to The Ohio Fuel Gas Company for gas supplied by the United Company at the river. In the investigation this angle of the case was presented by bringing into this record the complete record of the United case in West Virginia. A value was found and a rate fixed in that case by the West Virginia Commission

and the decision of the Commission was reversed by the Supreme Court of West Virginia and a subsequent rate tentatively fixed by the West Virginia Commission wherein the final determination of the matter is yet pending.

I have taken the facts as tentatively determined in that case by the West Virginia Commission and as shown by the record and have applied to them the principles used in the determination of the value of the Ohio Fuel Gas properties and with the allowances for expenses comparable to those allowed in The Ohio Fuel Gas case, which principles will be hereinafter discussed.

Attached hereto and marked Exhibit A and made a part of this opinion is the finding as to value, proper allocation and allowances for expenses and the fixing of depreciation and return. As a result of such computation I find the reasonable rate at the river to be charged by The United Fuel Gas Company to The Ohio Fuel Gas Company to be 17.79¢ [fol. 282] per thousand cubic feet of gas. For the purpose of determining the expenses of The Ohio Fuel Gas Company in this investigation, I would fix the charge at 17.79¢ per thousand cubic feet, which would be allowed as an expense to The Ohio Fuel Gas Company in Exhibit B, which likewise will be attached hereto and made a part of this record.

Gate Rate

In determining the reasonable profits accruing to The Ohio Fuel Gas Company in its dealing with the Columbus Company, I have approached the problem from the point of view of a utility rendering service to the public which The Ohio Fuel Gas Company really is in a large portion of the gas distributed by it, rather than determining a profit upon the amount of sales made by the company. In this consideration the Commission is immediately confronted with these two very difficult questions:

1. What is the proper allocation of The Ohio Fuel Gas property used and useful in furnishing gas to the City of Columbus?

2. What should be the fair valuation of the leaseholds owned by The Ohio Fuel Gas Company and used in the conduct of its business?

The company contends that there can be no particular allocation of either the production or transmission prop-

erty to any one market except upon the basis of sales or consumption of gas. The City, in direct conflict with this, contends that production property should be allocated upon the basis of sales, but that the transmission property should be allocated to the particular market upon a basis of mileage multiplied by peak demands of the various communities. The City has designated this plan as the demand mileage basis of allocation.

I am impressed with the fact that this property has been built up by the bringing together of many other distributing, producing and transmitting gas properties; that it is operating as a unit and that the complete structure which has been built is really used and useful for the furnishing of gas throughout the territory and that in an attempt to allocate any particular portion of the property to a given market so many divergencies appear and so many errors are apparent, producing inequalities as between the various communities that I have discarded as impracticable and unreasonable the plan submitted by the city for allocation [fol. 283] and am fixing approximately a gate rate which will be available throughout the territory served by The Ohio Fuel Gas Company.

I have not been forced to this position by the desire for an easy way out or because of relief which it would give in the investigations which are being conducted throughout the State, but rather by the impossibility of determining a factor which would reflect justly the credit that should be given a particular community because of the proximity to the market or of the varying transmission lines which would be necessary to reach the gates of the many cities served. Columbus gas may come from West Virginia, it may come from southern Ohio fields or from northern Ohio fields. It may be brought through one of several transmission systems or compressed in one station or in many. It is probable that gas will some day be brought into this system in Ohio from the west.

It is impossible to trace this gas in any portion of the system and it is the pressure applied from the various sources that determines the flow of the gas rather than the source of any one transmission line.

The second important question on which there is little precedent concerns the valuation of leaseholds of The Ohio Fuel Gas Company; first in determining the used and use-

ful property and then the value that should be applied to that which is used and useful. This Commission is limited in its method of determining valuation by statute and by the decisions of the Supreme Court of Ohio. By no stretch of the imagination can we conceive of a reproduction valuation of the gas in place. The method of using cost to determine value of leaseholds has been discarded by the Supreme Court in the first Logan Gas valuation case and it is practically impossible for this Commission to determine a valuation based upon market prices because of the fact that there is no gas property moving on the market as extensive as this and there can be found no ready buyer and willing seller whereby to determine a market value.

There has grown up in the gas business a classification of gas lands known as classes 1, 2, 3 and 4 leaseholds. So far as I can determine the classification practice in this case is similar to that employed by the Logan Company. In that case the Commission excluded classes 2, 3 and 4 [fol. 284] of the leaseholds, shown upon the records of the company as not used and useful property and that was sustained by the Supreme Court of the State in 121 O. S. 527. The Commission after that decision and upon the mandate from the Supreme Court fixed the value of the class 1 leaseholds of the Logan Gas Company, based upon the testimony in that case and upon a consolidation figure on the books of the company at $25.00 per acre.

In this case the city introduced testimony showing the reproduction cost of No. 1 leaseholds to be $1,569,479.88. The company claimed for these leaseholds $19,252,029. It will be noted that there is a wide range in the valuation set up by the company's witnesses varying from $39.37 per acre to $90.00 per acre. I believe the Commission, following its valuation in the Logan case (which property is now a part of the Ohio Fuel property) which valuation was sustained by the Supreme Court, should fix the value of the used and useful property, being Class 1 leaseholds at $25.00 per acre. This valuation for Class 1 leaseholds is approximately $2,500,000.00 greater than the book value of all leaseholds of The Ohio Fuel and Logan Gas companies combined if the arbitrary write up of approximately $3,700,000.00 in the Logan company's leaseholds during

1919 is eliminated. This amount of $25.00 per acre, in my opinion, would reasonably cover costs which were, as far as the record shows, reasonably fixed by the City's witnesses and provide a sufficient amount for the capitalization of the delayed rentals theretofore paid upon the other classifications of property when the same should be transferred to the used and useful classification upon the drilling of a productive well.

I, therefore, following the above classification and because of the fact that I have permitted the capitalization of delayed rentals in the allowance of $25.00 per acre, disallow delayed rentals on class 2, 3 and 4 leaseholds, in determining the Ohio Fuel profit. Those delayed rentals actually enter into the value of the leaseholds themselves and become a part of the rate base, if the reproduction theory is applied to the total Ohio Fuel property.

If this rule were not followed it would be possible for a company, less scrupulous than this one, to pay delayed rentals beyond requirements in order to increase the expenses and upon that basis fix a high rate to the consumer [fol. 285] which would have to be approved by a regulatory body and then after the rate had once been established, release the reserve leaseholds, as the company can do under its contracts and cut down the expenses of the company, thereby establishing a rate which would be unjust, unfair and excessive to the public.

These two important issues determined we can proceed now to the determination of the details necessary in the fixing of the value of The Ohio Fuel Gas property.

Work in Progress

This item is designated by the company as Incomplete Construction, and in this valuation it is eliminated from the rate base because the property is not yet used and useful and in the valuation method followed by the Commission, interest on money is allowed during the construction program. It is not revenue producing property at the date certain and should be only a part of the property used and useful upon which a rate is fixed when it is actually completed and placed in use.

Property Not Used and Useful

This adjustment eliminates from the rate base the old boiler room and shop at Sugar Grove Station which has been abandoned and is no longer used and useful.

Organization Expenses

I have eliminated any specific allowance for organization due to the fact that this element is in the allowance of 14% for undistributed construction expenditures.

Undistributed Construction Expenditures

This allowance is a judgment figure based upon engineering experience and there is presented to this Commission in the record a wide variance of opinion as among the engineers of the city and the company. These figures are in all cases based upon estimates rather than actual experience. The Company has applied different figures to production and transmission systems and the general property while the City has taken an over all figure, eliminating lands. In the Company's set up we find 4% allowance for the cost of financing upon all the property and 7% for interest during construction. Immediately it is apparent that the reproduction method of valuation is highly theo-
[fol. 286] retical. There has been wide variance even in the decision of the Supreme Court of the United States from the strict reproduction theory which if carried to the ultimate would include items of overhead, theoretically, which never have been and likely never would be expended in the actual construction of the plant.

These various plants which go to make up The Ohio Fuel property were not constructed as producing systems, transmission systems and general property but as a unit and have all been brought together as component parts of one property. It is true that The Ohio Fuel Gas Company in some towns sets up a gate rate and in other municipalities actually renders the service direct to the consumers, but the Commission will apply the general overhead charges to all property of The Ohio Fuel Company based upon the valuation fixed herein. This will include land and right-of-way but excludes working capital and leaseholds, and is divided as follows:

Engineering and superintendence during construction	2.5%
Organization	1.0%
Administrative expenses during construction	1.2%
Law expenses, injuries and damages and taxes during construction	1.8%
Interest during construction	6.0%
Other expenses which include omissions and contingencies	1.5%
Total	14.0%

It appears from the record that an allowance for omissions and contingencies is made by the company also in its direct overheads and therefore enters into its unit costs, but no deduction has been made to take care of this duplicate charge by the company.

Excessive Direct Overheads

The company's inclusion of amounts representing contractors' profit in its direct labor overheads together with certain inclusions of direct material overheads considered excessive, have been disallowed. Under the organization anticipated and allowed for in General Overheads, coupled with the facilities available to the company under a construction program contemplated by the reproduction theory, such portions of the work, if any, as may be let to sub-contractors have been adequately considered in the valuation and allowance therefore should not be superimposed in the company's direct overheads.

Cost of Financing

Following the practice employed by this Commission and [fol. 287] the decisions of the Supreme Court and the fact that I have considered the cost of money in the allowance for undistributed construction expenditures this item of cost of financing is excluded from the rate base.

Much testimony centered around the question of whether or not there should be allowed in the reconstruction of this property an allowance for cost of financing and a sharp distinction was made between what should be regarded as a cost of financing and what should be regarded as a discount upon the securities sold.

We are impressed with the fact that the statute does not contemplate the cost of gathering together the money necessary to construct a public utility. When it speaks of the [illegible] of one hundred cent dollars.

The statute does not contemplate that one who has no money to build a given plant, but must secure the same by the sale of his securities, shall have the burden of this cost of financing passed on to the consumer. The fact that the money invested is gathered from numerous small contributions through the sale of stock does not affect the principle. Those wishing to invest money in a public utility should make available a one hundred cent dollar for the purpose and not a [illegible] cent dollar.

Working Capital Including Material and Supplies

The amount of working capital including materials and supplies has been fixed by the company at $3,700,000.00 and by the city at $[illegible]. The accounts of The Ohio Fuel Gas Company due from the Columbus Gas and Fuel Company are [illegible] certain, time of payment being determined by the managing corporation which manages both the seller and the purchaser. A reasonable amount has been allowed The Columbus Gas and Fuel Company for working capital, materials and supplies. The Ohio Fuel Gas Company is operating directly, supplying gas to the consumers in many communities of the State. There might be a higher percentage for working capital, material and supplies needed for those distribution centers. The further fact must be taken into consideration that a good portion of the gas used by the Ohio Fuel Gas Company is purchased from The United Fuel Gas Company, another related company, whereof the West Virginia case a reasonable [illegible] has been allowed for working capital including an account for gas sold. The time of payment of that account is likewise in the complete control of the same engineering and managing corporation. The allowance in this case will be $[illegible] to The Ohio Fuel Gas Company, or approximately [illegible] of the present value of the physical property including undistributed construction expenditures. It is my opinion, considering the intercorporate relations of the companies and the allowances made to the distributing company in this case and the supplying company in the case of The United Fuel Gas and the

greater proportion of the material and supply account of The Ohio Fuel Gas Company which is actually used in distributing gas, that this allowance is a reasonable and fair sum for this item.

Going Concern Value

This Commission is an administrative board of the State Government. It is directly answerable to the Supreme Court of Ohio without an intervening tribunal, both as to questions of fact and law and it is my opinion that the principles which should herein be applied are those which have been determined by the Supreme Court of Ohio as the law of the State.

In the Cleveland Illuminating Company Case, 98 O. S. 462, the Supreme Court reversed an allowance by this Commission for the cost of attaching business. In this same case also, the Commission included a sum for cost of financing of its tentative value and eliminated it in the final value, which was sustained by the Supreme Court.

The direct evidence submitted by the company in this case, together with all the circumstances known to the Commission, are no more convincing or compelling than that which the Supreme Court of Ohio found, in the early Cincinnati Gas & Electric Company case, 96 O. S. 554, 559 (1917)—as well as in all subsequent cases in which the issue has been raised—to be insufficient to sustain the burden placed by the law upon the company. See also Lima Telephone Company vs. Public Utilities Commission, 98 O. S. 110, 124 (1918); Cincinnati vs. Public Utilities Commission, 113 O. S. 259, 294 (1925); Hardin-Wyandot Lighting Company vs. Public Utilities Commission, 118 O. S. 592, 602 (1928); Logan Gas Company vs. Public Utili- [fol. 289] ties Commission, 121 O. S. 507 (1929); and Portsmouth Gas Company vs. Public Utilities Commission, 119 O. S. 24 (1928). And see the decision of the United States Supreme Court in Des Moines Gas Company vs. Des Moines, 238 U. S. 153, 163 (1915), the only proceeding in which the question of a separate allowance for going value has been before the Supreme Court as a decisive issue, and in which the Court upheld the reasonableness and constitutional validity of the same rule which has prevailed, unimpaired, in this State for the past fifteen years.

Since the rejection of a separate going value figure in the Cincinnati Gas & Electric Company case, supra, the valuation decisions of this Commission have been noteworthy in their freedom from "percentage" and "judgment" allowances based upon "expert" testimony and supported by "estimates" and "calculations" of alleged costs—costs which in their very nature are wholly hypothetical and conjectural, and which, in any event and under any acceptable theory of rate regulation, have no proper place in the capital account of a utility company doing business in this State. Let it here be noted that under the classification of accounts prescribed by this Commission for the gas utilities under its jurisdiction, "new business" expenses are provided for in the operating accounts; and be it further noted that in the instant case we have allowed as an operating cost so much of the company's claim for "new business" costs as may properly be allocated to its utility, as distinct from its appliance business.

The effect of unwavering adherence to the "Ohio rule," both by the Supreme Court of Ohio and by this Commission, has manifested itself in the stability and predictability of our valuations and the enhanced dignity and economy of the valuation proceedings before this body. And it is significant that an overabundant flow of capital into the utility industry of Ohio has continued unabated since 1917.

Both the rule of reason and the rule of law, generally as well as the facts of this particular case, dictate our finding that no separate allowance for going value shall be made.

[fol. 290] Therefore, in the case of The Ohio Fuel Gas Company as in the case of the United Fuel Gas Company no independent allowance for going concern has been made upon which the company is entitled to a return or which must be taken into consideration in arriving at profits which may be realized by either the producing or the producing and transmitting companies.

Depreciation Reserve

The law is well established that the unexpended reserve for accrued depreciation should not be deducted from the rate base and I have followed the rule as laid down by the Supreme Court of Ohio in the Cincinnati Bell case, 113 O. S. 259 and do not deduct such unexpended reserve.

The reserve accounts of these various companies have been taken into consideration in arriving at a proper allowance to be credited to this account as an annual expense of the respective companies.

The rate allowed herein as an expense for depreciation and amortization, compared with the seven year average set up on the Ohio Fuel Gas Company's books is about ½% greater per year than the company has used to produce a reserve of over 22% of the book value of the depreciable property. This gives adequate recognition to greater reserve requirements in the future, indicated as proper by the fact that the accrued depreciation found by appraisal is about 28% of the book value of the depreciable property.

Gas Well Depreciation

Mr. Blundon's depreciation figure of gas wells was based upon the commonly accepted practice among engineers of determining the per cent condition from the rock pressure showing at the initial flow and at the time of the appraisal. This is the method used by Ford, Bacon and Davis, the company's appraisers in this case, in the United Fuel case and was the method under which Ford, Bacon and Davis were proceeding in the Ohio Fuel Gas case until, according to the testimony of Mr. Weymuth, he convinced them that a different method should be used, which would bring about a higher per cent condition and therefore a higher valuation.

Considering that Mr. Weymuth further testified that he favored another method of depreciation, even giving a higher valuation than that given by Ford, Bacon and Davis and the fact that the rock pressure method is an old established one used in determining depreciation of gas wells and that it has been adopted heretofore by Ford, Bacon and Davis, I accept the rock pressure method as used by Mr. [fol. 291] Blundon and apply the same to the valuation of the gas wells fixed by the Commission.

Depreciation of Other Property

I am of the opinion that the proper engineering practice in fixing depreciation is by actual observation of the physical condition of the property and, in arriving at the proper depreciation to be allowed in The Ohio Fuel Gas case, ex-

cluding gas wells which have been heretofore dealt with, I have followed Ford, Bacon and Davis, engineers who actually made observations of the property to determine its condition and have applied such per cent condition as determined by the witnesses to the Commission's value of each item of property as fixed in this case and find the per cent condition of the total property to be an average of 70.8551%. I have not applied the depreciation percentage to working capital, materials and supplies and leaseholds but allowed them on a 100% basis.

Allowance for Purchased Gas

The amount included by the company for gas purchased from the Preston Oil Company has been reduced by $76,363.00 in recognition of the contract price for such gas as shown by the record.

Allowance for General Administrative Expenses

Due to the expense adjustment made on the unoperated leases, the allocation of general administrative expenses is changed, resulting in a reduction of $48,476.00 applicable to the wholesale operations of The Ohio Fuel Gas Company. I have further reduced the operating and engineering fees to a cost basis in the sum of $143,162.00, following the rule laid down by the Supreme Court in the Illinois Bell Telephone case hereinbefore referred to.

The readjustment of expenses of The Ohio Fuel Gas Company, because of the disallowances of rentals on the unoperated leaseholds, has made necessary a reduction in allocation of Other General Expenses, in the amount of $21,490.00. I have disallowed as utility commission expenses, which is in effect, rate case expense, $21,913.00. The Ohio Fuel Gas Company has had no rate litigation before the Commission involving the rate in the City of Columbus and if it had, I have followed the practice of disallowing rate case expenses where no increase in rate is shown to be justified, by the litigation. Also, included is the item of [fol. 292] discounts on materials and supplies which have been omitted by the company in the sum of $4,709.00.

Another amount disallowed as improper charged by The Ohio Fuel Gas Company is Business Promotion Expense, $4,752.00. As applied to Columbus, no business promotion is needed at all by The Ohio Fuel Gas Company. Rate Case

expenses in the sum of $25,489.00 are excluded for the reasons hereinbefore outlined in public utility commission expenses. Loss on bonds in the sum of $1,019.00 is disallowed. Income Tax Service amounting to $8,286.00; and Sundry items in the amount of $504.00 are disallowed, amounting to a total of $40,059.00. Allocated upon the basis of the wholesale and retail business this sum of $40,059.00 shows an allocation of $25,377.00 to the wholesale business.

The above changes in expenses necessitates a recomputation of taxes with the following reductions:

Excise Taxes	$219,386.00
P. U. C. O. Taxes	9,049.00
Federal Income Taxes	957,561.00
Total	1,185,996.00

Property taxes actually paid have been allowed as an expense thus reducing the amount claimed by the company for taxes accrued by $11,328.00.

An error apparent in the company's calculation of the differential to The Northwestern Ohio Natural Gas Company produced a difference in the sum of $9,208.00.

Depreciation and Amortization

I have, in computing an allowance for depreciation and amortization, used 2½% of the value of the property, excluding land, working capital and material and supplies, which reduces the amount claimed by the company in the sum of $5,103,855.00. A complete study has been made of the depreciation charges of the company which show for the year 1929, an unexpended depreciation reserve in the sum equal to 22.20% of the book value of the company's property.

It is my opinion, therefore, that an allowance of 2½% on the value of the property of The Ohio Fuel Gas Company is a reasonable allowance for depreciation in view of the fact that there has been allowed completely the company's figures for maintenance, including non-productive well drilling expense.

[fol. 293] These amounts are sufficient, when taken together, to maintain the property in a high standard of effi-

ciency and to provide a reserve to take care of the property as it wears out and to ultimately provide for the complete replacement of the property.

The amount of depreciation, herein allowed, applicable to the portion of its property considered in this case is substantially the same amount in dollars, as shown by the books of the company for its entire properties including its distribution system.

M C. F. of Gas Sold

The total gas sold for 1929 is corrected to 53,579,575 M c. f., detailed on page 158 of the company's reply brief. This figure has been found to be correct and is 364,219 M c. f. less than the figure used by the company.

Rate of Return

The Ohio Fuel Gas Company has an unlimited supply of gas, either of its own right or through affiliated companies. It has the greatest established marked in the world, with the exception of the State of California, and has a virtual monopoly in the production and supplying of gas throughout a large portion of the State of Ohio. The history of the company is that money has flowed into this enterprise without an excessive cost and has been available for the necessary additions, extensions and improvements, even during this litigation, in unlimited amounts almost, for the construction of pipe lines into new fields and new markets.

It has recently come to the attention of the commission in the Barnesville case that this Company has drilled wells beyond its requirements and that it has been necessary to cap many of them and shut off production even to the very great dissatisfaction of the lessors. I likewise realize that the value of the dollar has increased in recent years; that the returns of business have been greatly restricted and although a utility should not be subject to the constant fluctuation of commodity prices, yet it is important that consideration be given to the increase in the price for gas in the last ten years in this territory—going up as it has with other commodity prices and I do feel that the rate of return should somewhat reflect the present trend, the present market and the value of money.

[fol. 294] I find, therefore, a reasonable rate of return, allowing a proper profit to The Ohio Fuel Gas Company

for the service rendered to be 6½% on the value of its property used and useful as hereinbefore determined. I have included the Federal Income Tax as an expense and as expressed by the Supreme Court in the Galveston case, this really raises the rate of return above the 6½% allowed.

Following, therefore, the principles hereinbefore detailed, I have arrived at a gate rate of 31.70¢ per M c. f. for gas sold to The Columbus Gas and Fuel Company, which amount is, in this computation, allowed as an expense to The Columbus Gas and Fuel Company. The computation and figures for the valuation, the revenues and expenses and the rate of return for the Ohio Fuel Gas Company are fully set out in Exhibit B, attached hereto and made a part of this opinion.

Retail Rate

We now come to the consideration of the property of The Columbus Gas and Fuel Company used and useful in the distribution of gas within the City of Columbus. In the application of the proper unit costs for materials and supplies, I am of the opinion that the material costs applied by the company are proper and that the construction job is not of such a size as to possibly vary greatly the quotations which were made to the company and the actual payments for the grade of pipe used.

I am of the opinion that the wage scale used by the Company is too high for the purpose of a reproduction cost new set-up. It would be a continuous construction program lasting over a period of two or three years. The City contended that some consideration should be given to the nature of the construction program and the lower cost of labor, which is recognized, both as of the date certain and as to the present time. The trend of labor costs has been constantly downward since the date certain. The lower labor costs and labor performance as set out by the city are proper and should be applied in evaluating the Distribution Line Equipment and Service Line Equipment in this case.

In regard to the cost of meters, the experience of the company is used although it possibly does not reflect the [fol. 295] discount that would be available on large orders such as would be possible in a reconstruction program.

The Gas Holder

An item of the difference in valuation by the city and company is due to the exclusion in the city's inventory of lots 32 and 35 at Spruce Street and Pennsylvania Avenue, which constitute a site for a gas holder,—the company having valued such property at $18,700.00. The City does not dispute the value, but does raise the question that the property is not used and useful. This brings us to the investigation of the utility of a gas holder, which was constructed for the distribution of artificial gas. The same item appears in Account 233—Gas Receivers and District Regulators,—where the company's valuation is $176,260.00 and the city's valuation is $30,095.00 a difference of $146,165.00. This difference is due to the exclusion in the city's valuation of the gas holder and the pertinent equipment located upon the land above referred to, the value of which has been excluded by the city under Account No. 228.

These two items covering the land and the structure above referred to may be considered together. The question of the right of the company to include the gas holder in its valuation was the center of much testimony and controversy, it being maintained by the company that it is used and useful, whereas the city admits that it is used, but that it is not, as a matter of fact, useful. In brief, the company's evidence is to the effect that the holder was tied into the natural gas system in 1912 and that it is used to build up the low pressure during peak loads, caused by the demand on the system, especially in the down-town section.

It developed that this holder, originally designed to furnsh pressure for the distribution of artificial gas, has been infrequently used in the course of the years it has been attached to the natural gas mains. It was further disclosed that were a natural gas distribution system to be now reproduced, this holder would have no place in the distribution of the gas which comes to the gate at a pressure higher than could be furnished by the gas holder and that the [fol. 296] contents of this holder, if called upon to furnish an emergency supply, in case of any disturbance of the natural pressure or any breakage of the transportation mains would furnish an inconsequential amount of gas.

As a storage tank it is useless and as a stabilizer it has no value and as a pressure producer it is without effect.

It is manifest that as far as the distribution of the natural gas within the city is concerned, it is a useless appendage. It should be excluded from the valuation.

General Office Equipment

The Company's valuation of $29,433.00, based upon inventory, actual prices and observed depreciation of the item of General Office Equipment, has been accepted.

General Shop Equipment—Acct. 251. General Tools and Implements—Acct. 256

The valuation fixed by the company because of the actual observation and inspection made by the company—the city having made no such inspection of this property, has been accepted.

General Garage Equipment—Acct. 253

I accept the company's figure for this item, not being impressed with the fixing of depreciation based wholly upon age. Actual observation seems to be the most practical way of determining per cent conditions of property, although there may be some basis for considering age in this item because of the fact that automobiles are known to depreciate very rapidly and there is a fixed standard of valuation based upon age.

Undistributed Construction Expenditures

There has heretofore in the case of The Ohio Fuel Gas Company, been applied for undistributed construction expenditures the figure of 14% on the valuation fixed by the Commission. We are here dealing with a smaller plant, the construction of which would not take the time necessary for the reconstruction of The Ohio Fuel Gas system thereby lessening charges for interest and taxes, and I am of the opinion that these accounts known as Undistributed Construction Cost and Omissions and Contingencies should be 12½% of the valuation found by the Commission of the physical property.

[fol. 297] Working Capital Including Materials and Supplies

For working capital including materials and supplies there has been taken a figure of $100,000.00 to take care of

payroll expenses, gas purchased and materials and supplies necessary. In fixing this amount I am aware of the fact that a part of the amount is to be used to purchase gas from an affiliated company, which in turn purchases gas from another affiliated company, and that each of these companies has been allowed amounts for working capital sufficient for its needs.

Going Concern Value

Regarding this plant as a going concern and allowing a sufficient amount for working capital and materials and supplies, I am complying with the rule laid down by the Supreme Court of Ohio, in the cases cited in the opinion on The Ohio Fuel Gas Company case, and therefore disallow any amount for going concern value, independent of that which appears in the undistributed overheads and the units applied.

Condition of Property

The company's witnesses in this case made actual observations of the property and applied a per cent condition to the same. The Commission made no independent investigation of this property to determine the per cent condition and therefore accepts the per cent condition for each item of property fixed by the company's witnesses, which amounts to an average of 84.6781% for the total property excluding working capital, materials and supplies.

Depreciation Expenses

As depreciation expense I have allowed a rate of 2% of the Columbus property and applied that percentage against the value of the property, as determined herein, excluding land, working capital, materials and supplies and General Garage Equipment. The unexpended reserve for accrued depreciation amounted in 1929 to $1,140,527.25, with debits for the year of $47,086.92, which debits were practically all for abandonment of lines. All other replacements of property were taken care of through operating expenses.

I do not in any way consider that the reserve for accrued depreciation should balance at all times the actual depre- [fol. 298] ciation figure which should be applied to the

property, but can and do take into consideration t amount of unexpended reserve for accrued depreciat in fixing the annual charge to expenses for the item depreciation, recognizing all the time there are certain u observed factors of depreciation which must be taken ca of in this allowance.

The depreciation on General Garage Equipment shou be allowed and distributed through the operating expens In view of the fact that this highly depreciable property handled in this way and of the extraordinary large reser which has been accumulated, the amount allowed for d preciation is thoroughly adequate to meet the needs the company. It compares favorably in dollar amou with the actual book figures of the company applicable the City of Columbus.

Rate Case Expenses

No allowance should be made for rate case expense this case. The federal case is not concluded, but t term of the rate has expired and any expense for litigati in regard to that rate case should not be considered determining the reasonableness of the present rate. Li wise there is no rate case expense allowed in the prese case because of the fact that no company should be pe mitted to charge rate case expense where an increase rate is not shown as justified by the litigation. If th were not the rule it would be possible for a company, continuous rate litigation to constantly increase, year aft year, the rates charged to the consumers.

Other Expense Items

I have disallowed the expense item for clamps, being the opinion, consistent with the finding of the Feder Court, that this is an item of capital expenses and h been heretofore included in the rate base. A portion of t business promotion expense, representing salaries of $2 677.00 is disallowed. This expense more properly appli to the sale of appliances and there is no evidence in t case that the expenditure has resulted in an increased ef ciency, a greater use or a lower cost for gas.

Under the decision of the Supreme Court in the Illino Bell case this Commission is authorized to determine t [fol. 299] cost of the service rendered by the holding co

[illegible] Company's Exhibit 77 [illegible] the service rendered to The [illegible] which amount is al- [illegible] than the 2½% item of [illegible] contended for by the City.

[illegible] the company in its [illegible] has been omitted as this item [illegible] charge which was errone- [illegible] properly charged to [illegible] The amount should not therefore affect [illegible] This coincides with [illegible]

[illegible] there is excluded [illegible] and Food Show [illegible] "The Whys of [illegible] in the Federal Court in Cin- [illegible] on two script stock [illegible] of Franklin County [illegible] tax matters for [illegible] and specifications [illegible] allowed as claimed [illegible]

[illegible] herein made, de- [illegible] on account of minimum [illegible] discounts and pen- [illegible]

[illegible] is noted that [illegible] in the total general [illegible] $[illegible] in $[illegible]298.00 in [illegible] from $76,231.00 [illegible] increase in ex- [illegible] from $294,069.00 in 1924 [illegible] the property was [illegible] The [illegible] Engineering and [illegible] incurred with the [illegible] the witnesses of the Com- [illegible] gas and decreasing [illegible] The result at least is [illegible] advocated.

Taxes

In the determination of the taxes allowed, I have reduced the property tax, real and personal, representing actual payments instead of accruals, in the amount of $4,612.00. Due to changes in expenses, a recomputation of other taxes results in the following credits being given to the company as a result of the earnings shown in the Commission's rate: Excise Taxes—$2,563.00; P. U. C. O. Taxes—$50.00; Federal Income Taxes—$22,644.00 or total net expenses allowed to the company in the sum of $25,570.00 more than shown by the company in its Exhibit No. 10.

Natural Gas Distributed

The total M C. F. of gas sold for 1929 is accepted as claimed by the City as more nearly in agreement with verifications of the company's book figures. It is 176,856 M C. F. less than claimed by the company.

There has been allowed as a loss for gas unaccounted for 5% of the gas actually distributed. This figure is fair because of the relatively high consumption of gas per customer per year.

Therefore including this 5% item for unaccounted for gas and applying the rate of 31.70¢ heretofore determined to be a reasonable allowance for cost of gas, there is allowed to The Columbus Gas and Fuel Company as a cost for gas at the City gate, the sum of $1,887,805.00 for 5,955,221 M C. F. purchased in 1929.

Rate of Return

The same rate of return should be allowed here as in the instance of the United Fuel and the Ohio Fuel case. The same basis as is reasonable for those companies should be for the Columbus Gas and Fuel Company.

The importance of the broadened investigation cannot be overestimated in that, while the only question at issue is whether or not the ordinance rate is just and fair to the Columbus company, the investigation and finding of the Commission as to the cost of producing and transmitting [fol. 301] gas to the City gate may reflect upon what would be a just price to be charged in other municipalities in the State of Ohio.

Many are of the opinion that it is a simple matter to drill a well and produce gas and distribute the same for public consumption and these persons are inclined to criticise any rate charged for this service without having a just conception of a legitimate reward that should be enjoyed by those who have had the foresight, the enterprise and the capital to make available this best of all fuels.

On the other hand it must not be forgotten that the company, enjoying the immunities of a public utility, has no right to impose upon the consumers a heavier burden than that which should be justly borne and that which will produce a proper rate of return, considering the value of the property devoted to this service.

Conclusion

I am hopeful that state regulation proves effective as a means of adjusting a rather fixed form of government established in the days of small business and rural communities to our complex and highly developed industrialized age. This Utilities Commission should at all times represent the public interest, with a full recognition of the fact that the utilities with their fixed capital and a fiduciary relation to their stockholders are definitely a part of the public, as is the individual consumer who pays for the service rendered. Our whole industrial fabric is built upon the service rendered by utilities and it would be a serious violation of the public trust for any member of any regulatory commission to fix a rate which in his judgment did not give an adequate return to the company or which, on the other hand was higher than the value of the service or which provided more than a fair and reasonable return.

The present established theory of public utility regulation is based upon the fact that utility rates should not fluctuate as industrial costs move up and down on the economic scale, but the peaks of prosperity should be levelled down and the valleys of depression filled in, that there may be a continuous, efficient service returning a reason- [fcl. 302] able rate to the company.

I have conscientiously approached a solution of this rate investigation, mindful of these various elements. Another great danger to Commission regulation is the interminable

delay incident to rate investigations. Such delay is neither fair to the public nor the utility. The very nature of utility regulation under our statute tends to draw out a case to an unreasonable time. The reproduction cost new theory less depreciation, itself is complicated, requiring much engineering investigation and resulting testimony.

In this case there were 11,000 pages of evidence introduced and 750 exhibits filed, many of them consisting of large volumes of figures and computations by expert witnesses. Briefs in the case totaled 1,000 pages, oral arguments were exhaustive and ably presented. The case was the most completely tried by engineering talent and able lawyers. When a case is so thoroughly presented it should be promptly decided by this Commission. Only by such prompt decision strictly in accordance with the facts and the law will utility regulation actually serve its purpose in our system of jurisprudence.

The valuation and calculation of expenses and the rate of return consistent therefor with the foregoing established rules and principles are shown on the attached sheets, marked Exhibit C and made a part of this opinion and results in a retail rate of a monthly minimum charge of 75¢ per consumer and a rate of 47.95¢ per thousand cubic feet of gas consumed.

It is apparent therefore that the rate fixed by council in Ordinance No. 645-29 is a just and reasonable rate, producing a fair return to the company upon the value of its property used and useful in rendering service in the City of Columbus and the appeal of the company should in my opinion therefore be dismissed.

I regret exceedingly that my colleagues and I have been unable to agree upon certain features of this case and the ultimate rate to be fixed and as a result that I must file this as an independent opinion.

(Signed) John W. Bricker, Commissioner.

Dated at Columbus, Ohio, October 3, 1932.

[fol. 303] EXHIBIT "A"

The Columbus Gas & Fuel Company—Formal Case No. 5935

United Fuel Gas Company—River Rate

Valuation:

Property devoted to the service of other than domestic and manufacturing customers in West Virginia, exclusive of distribution system property and the proportion of general property applicable thereto, as of 12-31-29.			Portion allocable to Ohio Fuel Gas Co. on M c. f. sales basis
Production system:			
Land	1,234		447
Rights of way	214,340		77,648
Plant & general overheads	14,207,333		5,146,805
Total		14,422,907	5,224,900
Transmission system:			
Land	16,270		5,894
Rights of way	294,725		106,768
Plant & general overheads	14,206,244		5,146,411
Total		14,517,239	5,259,073
General property:			
Land	145,205		52,603
Plant & general overheads	538,635		195,128
Total		683,840	247,731
Total physical property		29,623,986	10,731,704
Leaseholds		6,796,213	2,462,023
Working capital and materials & supplies		1,001,913	362,957
Total property used & useful		37,422,112	13,556,684
Expenses and return on investment:			
Proportion applicable to the above property for 1929			
Gas purchased for resale		1,520,431	550,798
Production expense		832,524	301,594
Transmission expense		942,507	341,436
General expense		407,491	147,619
Taxes		893,788	323,787
Interdepartmental		(red) 329,362	(red)119,316
Depreciation & amortization		906,437	328,370
Return @ 6½%		2,432,437	881,184
Total expenses & return		7,606,253	2,755,472
M c. f. of gas sold:			
Proportion applicable to the above property for 1929			
Wholesale sales		39,536,161	15,486,218
Retail sales—Ohio	1,352,473		.....
Retail sales—Kentucky	1,859,807	3,212,280	.....
Total M c. f. of gas sold		42,748,441	15,486,218
River rate per M c. f.:			
Derived by dividing the total expenses & return by the total M c. f. of gas sold		17.79¢	17.79¢

[fol. 304]

EXHIBIT "B"

Sheet 1

The Columbus Gas & Fuel Company—Formal Case No. 5935

The Ohio Fuel Gas Company—Gate Rate

		Portion applicable to Cols. Gas & Fuel Co. on M c. f. sales basis
Valuation:		
Property devoted to the service of Columbus, Ohio and other cities in Ohio and Indiana, exclusive of distribution system property and the proportion of general property applicable thereto, as of 12-31-29		
Production system	13,062,691	1,451,882
Transmission system	41,584,269	4,621,976
General property	1,089,344	121,078
General overheads	7,803,083	867,291
Total physical property	63,539,387	7,062,227
Leaseholds	7,284,900	809,696
Working capital and materials & supplies	1,700,000	188,950
Total property used & useful	72,524,287A	8,060,873
Expenses and return on investment:		
Proportion applicable to above property for 1929		
Purchased gas—from U. F. G. Co. @ 17.79¢ per M c. f.	2,754,998	306,210
Purchased gas—from others	2,873,056	319,332
Purchased gas expense	89,747	9,975
Production expenses	1,288,589B	143,223
Non-productive well drilling expenses	618,789	68,777
Transmission expenses	1,401,668B	155,792
General administrative expenses	392,161B	43,588
Other general expenses	199,346B	22,157
Taxes	1,669,492B	185,559
Credits	(red) 782,358	(red) 86,957
Depreciation & amortization	1,765,607	196,242
Return @ 6½%	4,714,079	523,957
Total expenses & return	16,985,174	1,887,855
M c. f. of gas sold:		
Proportion applicable to the above property for 1929	53,579,575	5,955,221
Gate rate per M c. f.		
Derived by dividing the total expenses and return by the total M c. f. of gas sold	31.70¢	31.70¢

NOTE:

A—Detail of valuation shown on Sheet 2.
B—Detail of expenses shown on Sheets 3 and 4.

[fol. 305] Exhibit "B"—Sheet 2

The Columbus Gas & Fuel Company—Formal Case No. 5935

The Ohio Fuel Gas Company

Detail of Valuation as of 12-31-29

		Reproduction value	Percent condition	Present value.
	Production system property:			
204	Land	20,514	100.0000	20,514
206	Rights of Way	115,508	100.0000	115,508
208	Gas well structures	343,382	80.0001	274,706
210	Other production system structures	162,136	85.9772	139,400
211	Gas well construction	14,192,077	41.8874	5,944,692
212	Gas well equipment	9,715,175	41.8874	4,069,434
213	Field line construction	704,068	85.0000	598,458
214	Field line equipment	1,784,716	85.0000	1,517,009
216	Drilling & cleaning equipment	540,256	70.0000	378,179
217	Other production system equipment	5,612	85.3706	4,791
	Total	27,583,444	47.3570	13,062,691
	Transmission system property:			
218	Land	67,818	100.0000	67,818
220	Rights of way	1,797,299	100.0000	1,797,299
221	Compressor station structures	1,076,486	84.3126	907,613
222	Transmission system measuring station structures	129,629	79.9998	103,703
223	Other transmission system structures	234,167	81.1382	189,999
224	Compressor station equipment	6,294,007	84.2072	5,300,007
225	Transmission system measuring station equipment	496,[illegible]	90.0002	447,203
226	Transmission line equipment	39,547,[illegible]	82.5000	32,627,000
227	Other transmission system property	168,7[illegible]	85.1335	143,627
	Total	49,812,884	83.4810	41,584,269
	General property:			
244	General office land	108,906	100.0000	108,906
245	Other general land	2,757	100.0000	2,757
247	General office structures	284,045	97.0091	275,524
248	Other general structures	81,595	79.6385	64,981
249	General office equipment	132,145	87.8588	116,104
251	General shop equipment	104,477	79.7640	83,335
256	General tools & equipment	367,339	82.0868	301,537
253	General garage equipment	11,201	70.4491	7,891
254	General laboratory equipment	173,529	73.9427	128,312
255	General telephone & telegraph equipment	1,265,994	86.0465	1,089,344
	Total			
	General overheads:			
258 to 266.	Undistributed construction expenditures	11,012,725	70.8551	7,803,083
	Total physical property	89,675,047	70.8551	63,539,387
	Leaseholds	7,284,900	100.0000	7,284,900
	Working capital and material & supplies	1,700,000	100.0000	1,700,000
	Total property used & useful	98,659,947	73.5094	72,524,287

[fol. 306] Exhibit "B"—Sheet 3

The Columbus Gas & Fuel Company—Formal Case No. 5935

The Ohio Fuel Gas Company

Detail of Expenses for 1929

	Production expenses:	
350	Superintendence labor	$49,293
351	Gas well & field line labor	392,672
353	Other production system labor	30,353
353½	Land & map department labor	80,414
354	Superintendence supplies & expenses	4,342
355	Gas well & field line supplies & expenses	69,263
357	Production system rent	3,353
358	Other production system supplies & expenses	9,016
358½	Land & map department supplies & expenses	13,036
359	Gas well royalties	538,206
362	Maintenance of other production system structures	1,589
363	Maintenance of gas well equipment	53,868
367	Maintenance of drilling & cleaning equipment	40,454
368	Maintenance of other production system equipment	2,730
	Total	1,288,589
	Transmission expenses:	
371	Superintendence labor	48,465
372	Compressor station labor	349,705
373	Measuring station labor	19,888
374	Transmission line labor	180,253
375	Other transmission system labor	24,366
376	Superintendence supplies & expenses	5,679
377	Compressor station supplies & expenses	68,729
378	Measuring station supplies & expenses	10,592
379	Transmission line supplies & expenses	53,963
380	Transmission system rent	133,860
381	Other transmission system supplies & expenses	4,307
382	Maintenance of compressor station structures	22,543
383	Maintenance of other transmission system structures	1,108
384	Maintenance of compressor station equipment	140,043
385	Maintenance of transmission line equipment	317,237
386	Changing transmission lines	4,681
387	Maintenance of measuring station equipment	15,751
388	Maintenance of other transmission system equipment	498
	Total	1,401,668

[fol. 307] Exhibit "B"—Sheet 4

The Columbus Gas & Fuel Company—Formal Case No. 5935

The Ohio Fuel Gas Company

Detail of Expenses for 1929

	General administrative expenses:	
427	Salaries of general officers	11,008
427½	Operating & engineering service fees	186,736
428	Salaries of general office clerks	102,342
429	General office stationery & printing	5,392
430	Other general office supplies	2,989
431	General officers' expenses	5,436
432	General office clerks' expenses	3,425
433	General law expenses	40,608
434	General office rent	17,800
435	Other general office expenses	15,498
437	Maintenance of general office equipment	927
	Total	392,161

Exhibit "B"—Sheet 4—Continued

	Other general expenses:	
442	Laboratory labor	352
443	Telephone & telegraph system labor	3,383
448	Laboratory supplies & expenses	2,213
449	Telephone & telegraph system supplies & expenses	1,819
454	Injuries & damages	63,600
455	Other insurance	22,222
455½	Employees' group insurance	13,600
456	Relief & pensions	35,912
457	Other general expenses	55,758
458	Inventory adjustment	1,229
459	Discounts on materials & supplies (red)	4,709
473	Maintenance of telephone & telegraph system	3,967
	Total	199,346
	Taxes:	
	Property tax	857,794
	Ohio excise tax	229,300
	Ohio Public Utilities Commission tax	8,706
	Federal Income tax	573,692
	Total	1,669,492

[fol. 308]

EXHIBIT "C"

Sheet 1

The Columbus Gas & Fuel Company Formal Case No. 5935

The Columbus Gas & Fuel Company—Retail Rate

Valuation:	
Property devoted to the service of the public within the City of Columbus, Ohio, as of 12-31-29	
Distribution system	3,252,344
General property	238,898
General overheads	436,405
Total physical property	3,927,647
Working capital and materials & supplies	100,000
Total property used & useful	4,027,647A
Expenses and return on investment:	
Proportion applicable to above property for 1929:	
Purchased gas—from Ohio Fuel Gas Company @ 31.70¢ per M. c. f. (5,955,221)	1,887,805
Purchased gas expense	1,078
Distribution expenses	120,611B
Utilization expenses	28,866B
Commercial expenses	108,799B
Business promotion expenses	23,762B
General administrative expenses	56,263B
Other general expenses	68,524B
Taxes	150,317B
Minimum charges (red).	21,990
Discounts & penalties (red).	34,469
Depreciation	68,196
Return @ 6½%	261,797
Total expenses & return	2,719,559

Exhibit "C"—Sheet 1—Continued

M. c. f. of gas sold:	
Proportion applicable to above property for 1929	5,671,63
Retail rate per M. c. f.:	
Derived by dividing the total expenses & return by the total M. c. f. of gas sold	47.9

NOTE: A—Detail of Valuation shown on Sheet 2.
B—Detail of Expenses shown on Sheets 3 and 4.

[fol. 309] Exhibit "C"—Sheet 2

The Columbus Gas & Fuel Company—Formal Case No. 5935

The Columbus Gas & Fuel Company

Detail of Valuation as of 12-31-29

		Reproduction value	Percent condition	Presc value
	Distribution system property:			
228	Land	23,550	100.0000	23,
230	Rights of way	5,072	100.0000	5,
231	District regulator structures	10,698	89.7457	9,
232	Other distribution system structures	14,868	98.3992	14,
233	Gas receivers & district regulators	31,300	96.1502	30,
234	Distribution line equipment	2,768,637	83.0391	2,299,
235	Service line equipment	515,666	77.3000	398,
236	Meters	458,902	95.6272	438,
237	Meter installations			
238	House regulators	16,957	84.9973	14,
239	Other distribution system equipment	18,990	97.3512	18,
	Total	3,864,640	84.1565	3,252,
	General property:			
245	Other general land	52,380	100.0000	52,
248	Other general structures	102,153	99.6897	101,
249	General office equipment	33,902	86.8179	29,
251	General shop equipment	18,684	84.2325	15,
256	General tools & equipment			
253	General garage equipment	51,197	77.1744	39,
	Total	258,316	92.4829	238,
	General overheads:			
258 to 266	Undistributed construction expenditures	515,370	84.6781	436,
	Total physical property	4,638,326	84.6781	3,927,
	Working capital and materials & supplies	100,000	100.0000	100,
	Total property used & useful	4,738,326	85.0015	4,027,

[fol. 310] Exhibit "C"—Sheet 3

The Columbus Gas & Fuel Company—Formal Case No. 5935

The Columbus Gas & Fuel Company

Detail of Expenses for 1929

	Distribution expenses:	
389	Superintendence labor	10,713
390	Distribution line labor	6,653
391	Labor removing & resetting meters	14,037
392	Labor inspecting & testing meters	256
393	Other meter department labor	2,149
394	Other distribution system labor	4,498
395	Superintendence supplies & expenses	885
396	Distribution line supplies & expenses	7,651
397	Meter department supplies & expenses	15,733
398	Distribution system rent	1,672
399	Other distribution system supplies & expenses	4,893
400	Maintenance of distribution structures	277
401	Maintenance of distribution lines	12,871
402	Changing distribution lines	731
403	Maintenance of service lines	14,362
404	Maintenance of meters	17,698
405	Maintenance of house regulators	36
406	Maintenance of gas receivers & district regulators	4,577
407	Maintenance of other equipment	919
	Total	120,611
	Utilization expenses:	
411	Customers premises labor	23,137
415	Customers premises supplies & expenses	5,729
	Total	28,866
	Commercial expenses:	
420	Operating labor	87,332
421	Operating supplies & expenses	21,467
	Total	108,799
	Business promotion expenses:	
422	Salaries & wages	6,711
424	Supplies & expenses	17,051
	Total	23,762

[fol. 311] Exhibit "C"—Sheet 4

The Columbus Gas & Fuel Company—Formal Case No. 5935

The Columbus Gas & Fuel Company

Detail of Expenses for 1929

	General administrative expenses:	
427	Salaries of general officers	2,989
427½	Operating & engineering service fees	39,845
428	Salaries of general office clerks	4,538
429	General office stationery & printing	1,743
430	Other general office supplies	205
431	General office expenses	653
432	General office clerks' expenses	21
433	General law expenses	2,356

Exhibit "C" Sheet 4—Continued

434 General office rent
435 Other general office expenses
437 Maintenance of general office equipment

Total

Other general expenses:
443 Laboratory supplies & expenses
452 Uncollectible accounts
454 Injuries & damages
455 Insurance
455½ Employees' group insurance
456 Relief & pensions
457 Other general expenses
458 Inventory adjustments
459 Discount on merchandise purchased
460 Gas used by company

Total

Taxes:
Property tax
Ohio excise tax
Ohio Public Utilities Commission tax
Federal Income tax

Total

[fol. 312] Before Public Utilities Commission of Ohio

Finding of Facts of November 3, 1932

This case now concerns the following cities and towns served by The Dayton Power and Light Company, to wit: Sidney, Washington C. H., Troy and Territory contiguous and adjacent to the corporate limits of Troy, Tippecanoe City, Piqua, North Hampton, South Charleston and Wilberforce.

[fol. 313] On June 17, 1929, The Dayton Power and Light Company filed schedules providing a rate for the several cities and towns, to become effective July 17, 1929. The schedules were filed under the now repealed Pence law, and automatically became operative after the expiration of 120 days from their filing.

On October 9, 1929, the company filed a bond in the sum of $65,000.00 covering the estimated amount of the increase in said rates, over a period of one year. The commission sat in this case, and heard over one thousand pages of oral testimony, touching upon the value of the property and the basis of allocation of that value to the several

[illegible] questions incident to [illegible]

[illegible] 1930, the commission [illegible] and allocations, and [illegible] all evidence available, [illegible] acquiring and transmit- [illegible] the fairness of the [illegible] within a reason- [illegible] application for the in- [illegible]

[illegible] the company advised the [illegible] further evidence to [illegible] The Ohio Fuel [illegible] to the towns [illegible] such further [illegible] after the close of [illegible] the Columbus gas [illegible]

[illegible] extended the time [illegible] to justify the gate [illegible]

[illegible] 1932 the Columbus gas [illegible] the commission fixed a date [illegible] the company to introduce its [illegible] rate price of 45c.

[illegible] the company and the cities [illegible] should be filed in this [illegible] the Columbus case [illegible] the questions at issue.

[illegible] a decision in the Co- [illegible] that it should now [illegible] now occupied by the Columbus [illegible] Columbus case, there may [illegible] would call upon the com- [illegible] a fair gate rate, the [illegible] themselves of any [illegible] the commission.

[illegible] the several schedules, is [illegible] per month; 60c per thou- [illegible] per month; 55c per [illegible] 20,000 cubic feet per month; [illegible] when bills are not paid within [illegible]

The case, before there was a pause in the proceeding to await the outcome of the Columbus gas case, had proceeded to the point where the commission was of the opin- [fol. 315] ion that if the 45¢ gate rate paid by the company to the The Ohio Fuel Gas Company, a related corporation, could not be justified, that the advanced schedules filed by the company and which have been in operation under the Pence law, were not justified, and that such advanced schedules should be rejected and that the company should be required to refund the overcharge made during the pendency of the case.

Inasmuch as The Dayton Power and Light Company is a company affiliated with The Ohio Fuel Gas Company, both of which are under the management of the parent company, The Columbia Gas and Electric Corporation, the evidence offered in the Columbus case and the conclusions of the commission based thereon, are pertinent to this case.

The commission having arrived at the conclusion that the gate rate to be paid by the distributing company to the producing and transporting company was 39¢, it must follow that the advanced schedules filed by the company, affecting the eight towns about enumerated, must be rejected and rate returned to what was charged prior to the filing of these new schedules, and that all moneys collected during the pendency of this proceeding under bond, must be returned by the company to the consumers.

A schedule hereto attached, shows that the income derived by the company from these municipalities exceeded the cost of service in the sum of $666.00 under the old schedule, and after the payment of a gate rate of 39¢.

It must, therefore, follow that with a gate rate of 39¢, with the rates charged under the new schedule, the return to the company would be excessive.

An entry will be drawn accordingly.

[fol. 316] The Dayton Power & Light Company

A. U. R. P. No. 341

Operating Expenses—Company Exhibit No. 8

* Gas purchased expense	$465,534
Distribution expense	32,841
Utilization expense	2,246
Commercial expense	22,301
Business promotion expense	10,695
x General administrative expense	32,432
Other general expense	9,989
Depreciation (2%)	13,721
Property tax	15,366
Excise tax	9,163
P. U. C. O. tax	348
Federal income tax	7,697
Return on Investment 6½%	56,445
Total cost of service	$678,778
Total revenue	679,444
Excess	666

* 1,192,471 M c. f. @ 39¢ = $465,064
470

$465,534

x $38,395 less $13,741 engineering and management fee
13,741 13,741 x 56.6042% = $7,778

24,654
7,778

$32,432

Depreciation allowance:
2% of $686,047=$13,721.

[fol. 317] The Dayton Power & Light Company

A. U. R. P. No. 341

Valuation—Company Exhibit No. 16

Acct. No.	Distribution system property	Present value
228	Land	$9,444
231	District regulator structures	2,496
232	Other dist. system structures	4,592
233	Gas receivers and dist. regulators	9,903
234	Distribution line equipment	334,586
235	Service line equipment	106,778
236	Meters	137,907
237	Meter installations	14,683
	Total	$620,389
	General Property:	
245	Other general land	11,971
248	Other general structures	51,734
249	General office equipment	16,355
253	General garage equipment	4,627
251	General shop equipment	2,386
256	General tools & equipment	
	Total	$87,073
	General overheads (14%)	99,045
	Working capital	61,880
	Grand total	$868,387

Working Capital

One year's operating expense excluding gas purchased and allowance for depreciation = $143,252 = 8 ÷ $17,907 or 1½ months' expense.

[fol. 318] Gas purchased = $465,064 ÷ 12 = $38,755 or 1 month's purchased gas.

Materials and supplies as per Record page 251 of testimony = $5218.

$17,907 plus $38,755 plus $5218 = $61,880 or Commission Engineers' Allowance for Working Capital.

Paving:

$171,674 = Dep. Value including General Overheads.
32,129 = General Overheads.

$139,545 = Dep. Value Less General Overheads.

[fol. 319]. BEFORE PUBLIC UTILITIES COMMISSION OF OHIO

Advanced Utility Rate Proceeding No. 341

In the Matter of the Proposed Increased Rates of THE DAYTON POWER AND LIGHT COMPANY for Gas Service Filed to Become Effective July 17, 1929

DECISION

This day, after full hearing, due notice of the time and place of which was given to all parties in interest, this matter came on for final consideration in pursuance to the hearing and inquiry to determine the propriety of the increased rates and charges for natural gas service set forth in the following schedules, filed by The Dayton Power and Light Company, on June 17th, 1929, for natural gas service in the following prescribed territories and communities set forth in proposed schedules identified as follows:

P. U. C. O. Number	Applicable to
4	Sidney, Ohio
4	Washington Court House, Ohio,
5	Troy, Ohio
5	Tippecanoe City, Ohio
5	Piqua, Ohio
6	Territory outside of and adjacent and contiguous to the corporate limits of Troy, Ohio
6	North Hampton, Ohio and territory contiguous and adjacent thereto.
7	South Charleston, Ohio
8	Wilberforce, Ohio.

the use and operation of which proposed schedules were suspended by the order made and entered herein July 9th, 1929, and which rates and charges so proposed were put into effect under authority of the bond filed by the said respondent on October 19th, 1929, and the testimony and exhibits offered and introduced in evidence, which testimony and exhibits with respect to the wholesale or gate rate price paid by the respondent to The Ohio Fuel Gas Com-

pany, for the natural gas which the respondent purchases for distribution in the aforesaid territory and communities, as well as in all other territory where it engages in the distribution of natural gas, consists of a copy of all of the testimony and exhibits with respect to the wholesale or gate rate price for natural gas which were introduced in the proceeding entitled in the matter of the complaint and appeal of The Columbus Gas and Fuel Company, No. 5935.

And the Commission coming first to consider the application of the respondent The Dayton Power and Light Company, filed October 31st, 1932, for an additional period of two weeks, within which to submit a further brief herein, and

It appearing that the points enumerated which the respondent desires to cover in said brief were fully argued in the written and oral arguments made and presented to the Commission in the appeal of The Columbus Gas and Fuel Company, No. 5935, the Commission finds:

That there is no necessity for the preparation and submission of the said proposed brief, and

That the request for additional time, within which to do so, should be, and hereby the same is, refused.

To which action of the Commission in refusing such additional time for the filing of a further brief herein, the respondent, The Dayton Power and Light Company, then excepted, here now excepts and its exceptions here are noted of record.

[fol. 320] And the Commission, coming now to consider the matters herein at issue, and having due regard for all of the testimony and exhibits offered and introduced in evidence at the hearing held herein, and having, this day, made and filed in writing, its findings of fact in this proceeding, and hereby readopting the finding and order made and entered herein November 21st, 1930, the going into effect of which finding and order was suspended by the entry of January 9th, 1931, hereby further finds:

That the respondent has not sustained the burden imposed by the statute and proven to be just and reasonable, the proposed increased rates set forth in the proposed schedules aforesaid.

It is, therefore, ordered that the aforesaid proposed new schedules of The Dayton Power and Light Company be,

and hereby the same, and each of them, are stricken from the files of this Commission and the said The Dayton Power and Light Company hereby notified, directed and required to cease and desist from collecting, imposing or charging, or attempting to collect, impose or charge the proposed rates set forth therein. It is, further,

Ordered that said The Dayton Power and Light Company, be, and hereby it is notified, directed and required, within thirty days herefrom to refund to each and every consumer in the aforesaid territory and communities, the difference, with interest thereupon, at the rate of six per-centum per annum from the date of the payment of said charges to the date of such refund, between the charges imposed and collected for service actually rendered under said proposed schedules under authority of the bond duly filed herein, and the rates and charges which would have obtained for the furnishing of such service on the basis of the respondent's schedules applicable in said territory and communities which were sought to be superseded thereby, provided that if any such money shall not have been claimed by the corporations or persons entitled thereto, within one year from the time the same shall become due and payable, in accordance with this order, all such moneys shall be paid by the said respondent to the Treasurer of the County or other political subdivision in which said proposed schedules were maintained under authority of the bond so given herein. It is further,

Ordered that at the conclusion of such refunding, the respondent make detailed report thereupon, and that jurisdiction of this Commission be, and hereby is retained for the purpose of such audits, as may be necessary and proper with respect thereto.

Dated at Columbus, Ohio, this 3rd day of N-vember, 1932.

The Public Utilities Commission of Ohio, E. J. Hopple, Chairman; Frank W. Geiger, Commissioners. (Seal.)

A true copy:

Ira E. Sprankle, Superintendent of Investigation.

By Commissioner JOHN W. BRICKER:

I concur in the rejection of the increased schedules of the respondent, The Dayton Power and Light Company, but dissent from that part of the majority opinion filed herein

and particularly the computation of the cost of service in the involved communities, appended thereto, wherein is recognized as proper the payment to The Ohio Fuel Gas Company of a wholesale, or gate rate, price for gas in excess of the 31.7¢, which I found to be reasonable in the appeal of The Columbus Gas and Fuel Company No. 5935.

John W. Bricker, Commissioner.

[fol. 321] BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

[Title omitted]

APPLICATION BY PETITION FOR REHEARING

Now comes The Dayton Power and Light Company and makes application for re-hearing on and of the Commission's findings and order in the above entitled and numbered proceeding, filed and entered upon the records of the Commission November 3, 1932, and also for the suspension, modification and vacation of said order for the reasons and upon the grounds herein set forth.

Said findings and order apply to and affect the rates for natural gas service supplied by this applicant in the following places, all being in the State of Ohio, viz: The City of Sidney, The City of Washington (known also as Washington Court House), The City of Troy, The Village of Tippecanoe City, The City of Piqua, Territory outside of and adjacent and contiguous to the corporate limits of Troy, The Village of North Hampton and territory contiguous and adjacent thereto, The Village of South Charleston and Wilberforce, which places are hereinafter designated collectively as "the towns".

1. Said order and findings herein complained of, and each of them, are contrary to law, unjust and unreasonable, and are not supported by and are contrary to the evidence and against the weight thereof, and will deprive this applicant of its property without due process of law and deny it the equal protection of the law, and therefore repugnant to the Fourteenth Amendment to the Constitution of the United States, all to the great prejudice of its substantial rights.

[fol. 322] 2. The rates and charges for furnishing natural gas service by this applicant for public and private consumption in the towns which it may charge and collect under said order of November 3, 1932, are confiscatory and will deprive this applicant of its property without due process of law and deny it the equal protection of the law, contrary to section one of the Fourteenth Amendment to the Constitution of the United States. This applicant asserts that each and all the grounds which it sets out in this application for rehearing, which are adopted as if fully repeated here, both separately and collectively deprive it of its property without due process of law and deny it the equal protection of the law contrary to the provisions of the Constitution of the United States.

3. The rates to be charged under said order of November 3, 1932, are insufficient to yield applicant reasonable compensation for the natural gas service rendered and to be rendered by it.

4. The rates to be charged under said order of November 3, 1932, do not give due regard to the value of applicant's property actually used and useful for supplying natural gas service to the towns and their inhabitants and for their convenience in that respect, and to the necessity of making reservations from income for depreciation, surplus and contingencies and such other matters as may be proper.

5. The Commission's findings and order of November 3, 1932 do not give due regard to the City gate way contracts existing between The Dayton Power and Light Company and The Ohio Fuel Gas Company whereunder this applicant receives its supply of natural gas and violate section ten of Article One of the Constitution of the United States by impairing the obligation of said contracts.

6. The findings and order of the Commission in respect to the amount to be paid by this applicant to The Ohio Fuel [fol. 323] Gas Company for natural gas at the city gateways is repugnant to the power given to Congress by Section Eight of Article One of the Constitution of the United States to regulate commerce among the several states, in that an attempt is thereby made to regulate the price for natural gas to be paid by The Ohio Fuel Gas Company to the United Fuel Gas Company for natural gas produced in

the States of West Virginia and Kentucky and transported in interstate commerce from points in the State of West Virginia to the several gateways of the towns where it is delivered by The Ohio Fuel Gas Company to this applicant.

7. The Commission erred in finding and holding the value of this applicant's property used and useful in furnishing natural gas service to the towns and their inhabitants to be only $868,387 instead of $1,250,221 as established by the undisputed evidence.

Said reduction of valuation of the company's property consisted in eliminating the following items:

Organization expense	$24,774
Cost of financing	39,600
Going Concern value	125,000
Cost of cutting and restoring paving	139,545

and in reducing the following items:

Working capital by	21,320
General overheads by	31,595
Total reduction	$381,834

8. The Commission erred in not taking judicial notice of and making proper allowance for the increased income tax this applicant must pay the United States under an act of Congress passed in June 1932.

9. The Commission erred in using the rate 1.35 per cen- [fol. 324] tum as the rate to be allowed this applicant for excise taxes, whereas the excise tax rate in effect at the time of the finding and order of November 3, 1932, was and will be for some time to come, 2.35 per centum.

10. The Commission erred in its computation of the public utility tax to be paid by this applicant on account of the towns.

11. The Commission erred in allowing only two per centum for annual depreciation when, according to the only evidence submitted herein this allowance should have been not less than 4 per centum.

12. The Commission erred in not allowing depreciation on overheads applicable to those items of property which are depreciated in the valuation.

13. The Commission erred in fixing the price of natural gas at the gateways of the towns at 39 cents per M cubic feet instead of at 45¢, the price which applicant is obligated to pay under its contracts with The Ohio Fuel Gas Company.

14. In its order and findings of November 3, 1932, the Commission erred in fixing and determining the amount of applicant's annual operating expenses in the following particulars:

(1) In reducing gas purchased expense from $537,082 to $465,534.

(2) In reducing the engineering and management fee from $13,741 to $7,778.

(3) In reducing the allowance for depreciation from $46,405 to $13,721.

(4) In reducing the excise tax from $20,016 to $9,163.

(5) In reducing the public utility tax from $436 to $348.

(6) In reducing the Federal income tax from $15,945 to $7,697.

[fol. 325] 15. The rate of return of 6.5 per centum allowed applicant is insufficient and unreasonable, is contrary to the evidence and unsupported by any evidence, and is confiscatory.

16. The evidence shows that under the identical rates to be charged under said order of November 3, 1932, applicant sustained a loss in the year 1929, and under the increased rates now in effect its return has been less than 2 per cent on the proved value of its property.

17. The Commission erred in said order of November 3, 1932, in directing and requiring this applicant within 30 days from that date to refund to each and every consumer in the towns, the difference, with interest thereon as set forth in the order, between the charges imposed and collected for service rendered under said schedule and the rates and charges which would have obtained for the furnishing of such service, on the basis of this complainant's former schedules applicable to the towns, and in providing that if any such money shall not have been claimed by the

corporations or persons entitled thereto within one year from the time the same shall become due and payable according to said order, all such moneys shall be paid by this applicant to the Treasurer of the County or other political subdivision in which said proposed schedules were maintained under authority of said bond; and in ordering that at the conclusion of such refunding this applicant make detailed report thereon, and that jurisdiction of the Commission is retained for the purpose of such audits, as may be necessary and proper with respect thereto.

18. The Commission erred in refusing to consider evidence of the market value or going price for gas in the general vicinity of the towns and comparable gateway prices fixed by contracts between unrelated companies; also in refusing to treat the gas purchase contracts between applicant and The Ohio Fuel Gas Company as prima facie reasonable, and in holding that the applicant had not sustained the burden of proof to show that the price of 45¢ per M cubic feet paid for gas distributed by it is fair and reasonable. The Commission committed further error in [fol. 326] ordering the applicant to produce evidence touching the cost to The Ohio Fuel Gas Company of producing, acquiring and transporting natural gas to the several city gateways herein involved.

19. The holding and determination that 39¢ per M is a fair and reasonable price to be paid by the applicant to The Ohio Fuel Gas Company for gas purchased by it at the respective town gateways, is contrary to the uncontradicted, competent and credible testimony. The evidence establishes that the contracts in question were made in good faith; that the applicant is a separate and distinct corporation exercising all its functions and conducting its own business; that said contracts were approved by its board of directors, and that the contract price of 45¢ per M is fair and reasonable and the best that could have been obtained from any source. Said holding is inconsistent with the specific finding of the Commission in its order of November 21, 1930 that the contracts are not "void or a sham or fraudulent."

20. Concurrently with the filing of this application for rehearing, this applicant files a protest of the valuations found by the Commission in its said findings and order of November 3, 1932, and adopts, and requests the Commission

to consider as if herein specifically set out, and as separate grounds upon which applicant considers said findings and order to be unreasonable and unlawful and as part of this application for rehearing, each and all of the separate grounds of said protest.

[fol. 327] 21. The Ohio Fuel Gas Company, United Fuel Gas Company. In fixing and determining the applicant's annual operating expenses the Commission erroneously determined the price which the applicant should pay to The Ohio Fuel Gas Company for gas purchased by it, delivered at the various town gateways, to be 39¢ per M cubic feet instead of 45¢, the price specified in the contracts; and in arriving at said determination the Commission committed the following errors:

(1) The Commission disregarded said contracts between this applicant and The Ohio Fuel Gas Company for gas at the gateways of the towns, notwithstanding the evidence.

(a) that The Ohio Fuel Gas Company charged other unrelated companies in Ohio higher prices at the City gate, which gateway prices have been allowed by the Commission in recent rate cases.

(b) that gate rates charged by other companies in Ohio were higher than the rates fixed in said contracts.

(c) that the United Fuel Gas Company charged to the Hope Natural Gas Company, an unrelated company, a price equal to that charged by the United Fuel Gas Company to The Ohio Fuel Gas Company for similar quantities of gas.

(d) that the State and Federal Courts in West Virginia, as well as The Public Service Commission of West Virginia, have forbidden the United Fuel Gas Company to discriminate in favor of a related company against an unrelated company. As shown by the evidence, the charge to the Hope Natural Gas Company amounts to an average of more than 26⅓ cents per M c. f.

(2) The Commission is and was without any authority to make any finding, decision or order in this proceeding in [fol. 328] respect to the value of the property of The Ohio Fuel Gas Company.

(3) The Commission is and was without any authority to make any finding, decision or order in this proceeding

in respect to the value of the property of the United Fuel Gas Company.

(4) The Commission is and was without any authority to make any finding, decision or order in this proceeding in respect to the operating expenses, rate of return or price charged for natural gas by The Ohio Fuel Gas Company.

(5) The Commission is and was without any authority to make any finding, decision or order in this proceeding in respect to the operating expenses, rate of return or price charged for natural gas by the United Fuel Gas Company.

(6) The value found for the property of The Ohio Fuel Gas Company is contrary to the evidence in this proceeding.

(7) The value found for the property of the United Fuel Gas Company is contrary to the evidence in this proceeding.

(8) If said valuation, finding and order should be held to be binding upon The Ohio Fuel Gas Company then said valuation, finding and order will deprive said company of its property without due process of law, and deny to it the equal protection of the law, and would therefore be repugnant to the Fourteenth Amendment to the Constitution of the United States.

(9) If said valuation, finding and order should be held to be binding upon the United Fuel Gas Company, then said valuation, finding and order will deprive said company of its property without due process of law, and deny to it the equal protection of the law, and would therefore be repugnant to the Fourteenth Amendment to the Constitution of the United States.

(10) The Commission failed to allow as a part of the compensation to be paid The Ohio Fuel Gas Company proper and adequate annual charges for depreciation of the sev-[fol. 329] eral classes of its property over and above the cost and expense of maintenance to keep its property in a state of efficiency, corresponding to the progress of the art or industry and necessary for the purpose of renewing, restoring, replacing and/or substituting depreciated property in order to keep the plant in a state of efficiency.

(11) The Commission failed to allow to The Ohio Fuel Gas Company either depreciation or amortization on its rights of way.

(12) The Commission failed to make any annual allowance to The Ohio Fuel Gas Company for depreciation or amortization on undistributed construction expenditures (overheads), although in arriving at the present value of said undistributed construction expenditures the Commission made a deduction for observed depreciation.

(13) The Commission failed to allow as a part of the compensation to be paid The Ohio Fuel Gas Company proper and adequate annual charges for amortization of its property necessary to insure return to the stockholders of said company of their investment when said property is exhausted and use up in the public service.

(14) The Commission failed to allow to The Ohio Fuel Gas Company a reserve for amortization on any property other than No. 1 leaseholds, gas well construction and gas well equipment.

(15) The Commission allowed The Ohio Fuel Gas Company only $4,158,954 for amortization, whereas the only competent evidence in this proceeding showed that the amount to be allowed should not have been less than $5,449,221. Furthermore, the finding of the Commission requires this amortization to be kept in a revolving fund. Obviously such revolving fund should have been based upon a valuation at least sufficient for the period for which the Commission requires this applicant to render service under said order of November 3, 1932.

[fol. 330] (16) The Commission disregarded the agreement in evidence entered into October 31, 1927 by and between United Fuel Gas Company and The Ohio Fuel Gas Company, notwithstanding the evidence:

(a) that the United Fuel Gas Comapny charged the Hope Natural Gas Company, an unrelated company, a price equal to the price charged by United Fuel Gas Company to The Ohio Fuel Gas Company for similar quantities of gas at similar points of delivery.

(b) that the State and Federal Courts of West Virginia, as well as The Public Service Commission of West Vir-

ginia, have prohibited the United Fuel Gas Company from discriminating in favor of a related company against an unrelated company.

The foregoing action of the Commission resulted in allowing in the expenses of The Ohio Fuel Gas Company only $3,413,162 for gas purchased from the United Fuel Gas Company, when the amount should have been $4,172,362.

(17) The Commission refused to allow the sum of $1,684,913 or any other sum, for lease rentals by The Ohio Fuel Gas Company. The Commission also refused to allow any return on the value of the property on which lease rentals were and are paid. If The Ohio Fuel Gas Company must pay its lease rentals out of its return on property other than said leaseholds, such return on the valuation of its property found by the Commission in this proceeding will be reduced to an annual rate of 4.2395 per centum without taking into consideration the proper allowance for excise tax and will deprive said company of its property without due process of law and deny to said company the equal protection of the law, contrary to the Fourteenth Amendment to the Constitution of the United States.

[fol. 331] (18) The Commission erred in limiting the leasehold valuation of The Ohio Fuel Gas Company to No. 1 acreage and in failing to take into consideration the resulting increased cost of production and transmission, as shown by the uncontradicted evidence. The undisputed evidence shows that it would be neither economical nor practical to attempt to operate The Ohio Fuel Gas Company with No. 1 leaseholds only.

As shown by the uncontradicted testimony of practical natural gas men, such practice would result in increasing the cost of production. More wells would have to be drilled on No. 1 acreage to get the necessary volume of gas, with the result that the rock pressure of all the wells would decrease, thus requiring additional pumping and compressor equipment. Offset wells would have to be drilled to protect No. 1 acreage from drainage, if the company did not control Classes 2, 3 and 4, and it would be necessary to reduce the line pressure in order to get the gas out of the ground and then to bring the gas from the low pressure necessary to take it out of the ground to the high pressure necessary for its transmission to the markets.

The cost of natural gas thus obtained would amount to a prohibitive figure, much greater than the price allowed herein to this applicant to be paid to The Ohio Fuel Gas Company at the gateways of the towns.

(19) The Commission found that The Ohio Fuel Gas Company has an unlimited supply of gas and gave this as a reason for not allowing amortization of plant, other than Account 211—Gas Well Construction, Account 212—Gas Well Equipment and No: 1—Leaseholds. Notwithstanding this, the Commission refused to allow either a return on the investment or the carrying charges for the reserve acreage which the Commission found contains the unlimited supply of gas which makes such additional amortization unnecessary, upon which the Commission justified its assumption for the purposes of depreciation of an average remaining life for such unamortized property of not [fol. 332] less than sixty-six and two-thirds (66 ⅔) years, and upon which the Commission further justified a rate of return of 6.5 per centum on the present value of the property devoted to an admittedly hazardous undertaking.

(20) The Commission failed to take into consideration the cost and amount of acreage which it was necessary to prospect, take up and test to develop the company's present No. 1 acreage.

(21) The Commission found that the No. 1 acreage of The Ohio Fuel Gas Company, on which it allowed a valuation, is sufficient only for three years and two months, which is an unreasonably short time for said company and this applicant to have an adequate and reliable supply of natural gas to enable the latter to supply proper natural gas service in and to the towns.

(22) In arriving at the percent of General Administrative and other General Expense applicable to the production and transmission systems, the Commission omitted consideration of the amount paid by The Ohio Fuel Gas Company for lease rentals.

(23) The Commission allowed The Ohio Fuel Gas Company only $391,979. for General Administrative Expense—Accounts 427 to 437, when the only competent evidence in this proceeding showed that such annual expenditure was $583,799.

(24) The Commission allowed The Ohio Fuel Gas Company only $199,347. for Other General Expense—Accounts 442 to 473, when the only competent evidence in this proceeding showed that such annual expenditure was $272,835.

(25) In arriving at the rate of return, labor prices and labor performances, the Commission recognized trends and present day conditions, but allowed only 1.35 per centum for excise tax, whereas the law in effect at the time of said finding and order required The Ohio Fuel Gas Company to pay 2.35 per centum on its gross receipts.

[fol. 333] (26) The Commission allowed only 12 per centum for Federal income tax, whereas the allowance should have been 13¾ per centum for both The Ohio Fuel Gas Company and the United Fuel Gas Company, without any deduction for bond or other interest not allowed or considered by the Commission as operating expenses.

(27) The Commission allowed only 6.5 per centum return on the respective rate bases found for The Ohio Fuel Gas Company and the United Fuel Gas Company, whereas such return for each of said companies should not have been less than 8 per centum.

(28) The Commission did not give due regard to the necessity of making reservations from income for surplus and contingencies of either this applicant, The Ohio Fuel Gas Company or the United Fuel Gas Company.

(29) While the Commission deducted from the operating expenses of this applicant and The Ohio Fuel Gas Company discounts obtained on account of cash payments by said companies, it did not allow adequate working capital with which to take advantage of such discounts in the future.

(30) While the Commission found and held that it would follow the allowance of expenses and return on investment made by The Public Service Commission of West Virginia in respect to the United Fuel Gas Company, yet this Commission reduced the following allowances of the West Virginia Commission:

(a) Depreciation allowance on general property from 5 per cent to 1.12 per cent.

(b) Return on the rate base from 8 per cent (or under the temporary rate 7.35 per cent) to 6.5 per cent.

(31) The Commission erred in finding, holding and/or ordering that the value of all of the property of The Ohio Fuel Gas Company, exclusive of distribution plant, as of December 31, 1929, is the sum of $74,538,280, as fully set [fol. 334] forth in Exhibit B appended to its order filed in proceeding No. 5935, and adopted by it in this case.

(32) The Commission erred in finding, holding and/or ordering that the value of all the property of the United Fuel Gas Company, exclusive of distribution plant, as of December 31, 1929, is the sum of $37,422,112 as set out in Exhibit A appended to its order entered in proceeding No. 5935, and adopted by it in this case.

(33) The Commission erred in finding, holding and/or ordering that for the same fiscal period, the reasonable operating expenses of The Ohio Fuel Gas Company were as set forth in Exhibits B, Sheet 1 and A, Sheet 1, attached to its finding of facts filed in proceeding No. 5935, and adopted by it in this case.

(34) The Commission erred in finding, holding and/or ordering, in Proceeding No. 5935 before it, that the reasonable and just price to be paid for natural gas by The Ohio Fuel Gas Company to producing companies at the Ohio River is the sum of 22 cents per 1,000 cubic feet, which finding the Commission adopted and acted upon in this proceeding.

(35) The Commission erred in excluding from its consideration the evidence which sought to establish the fairness of the City gate price by proof that the same was the lowest that could be obtained by this applicant from the supplying company or from any other available source of supply.

(36) The Commission erred in holding that the evidence of the value of productive acreage (i. e. Class No. 1) "could not be based upon the price between a willing buyer and a willing seller. In the very nature of the operation, companies have a monopoly within their own field and further, the value of the land in the market would depend upon the price which the regulated company may be permitted to charge to its customers," in the face of the undisputed evidence showing that the gas lands of The Ohio Fuel Gas [fol. 335] Company are contiguous to the gas lands of other

and unrelated natural gas producers and are interspersed with gas lands belonging to other and unrelated natural gas producers, and in the face of the undisputed evidence of competent and creditable witnesses that a general market does exist for gas lands and leaseholds in the vicinity of those of The Ohio Fuel Gas Company, that such leaseholds are bought and sold in the open market, between willing buyers and willing sellers, and that a general market value for such leaseholds does exist.

(37) The Commission erred in admitting, receiving and/or relying upon the evidence, or any part thereof, of the witness Harry Allensworth, for the reason that he did not possess the necessary training, education and/or experience which gave him any peculiar knowledge in respect to the subjects and matters to which he testified.

(38) The Commission erred in over-ruling the objections to the testimony and exhibits introduced by and through the witness Harry R. Allensworth.

(39) The Commission erred in admitting, receiving and/or relying upon the evidence, or any part thereof, of the witness J. Paul Blundon for the reason that he did not possess the necessary training, education and/or experience which gave him any peculiar knowledge in respect to the subjects and matters to which he testified.

(40) The Commission erred in overruling the objections to the testimony and exhibits introduced by and through the witness J. Paul Blundon, and especially to that testimony and those exhibits of said Blundon which were predicated upon the testimony and exhibits of the witness Harry R. Allensworth.

(41) The Commission erred in refusing to consider competent and relevant evidence tending to show that there is a market for gas leaseholds and tending to show the value of such leaseholds in such market.

(42) The Commission erred in refusing to admit and consider Company Exhibit No. 140, which was a written [fol. 336] offer from Benedum-Trees Oil Company of Thirty Million Dollars cash for the leaseholds of The Ohio Fuel Gas Company.

(43) The Commission erred in fixing and determining the value of the natural gas leaseholds of Class No. 1 of The Ohio Fuel Gas Company in that it did not base its alleged valuation thereof upon any evidence in this proceeding, but upon the amount which had been determined as the value of certain natural gas leaseholds in another case, to-wit, the Logan Gas Company case, referred to by the Commission in its findings and opinion.

(44) The Commission made its determination of the amount which the applicant shall be allowed to charge in its operating expenses for gas purchased by it from The Ohio Fuel Gas Company, to-wit, 39¢ per thousand, on the identical basis that it would determine a rate to be charged by said Ohio Fuel Gas Company for such gas if The Ohio Fuel Gas Company in selling and delivering such gas were a public utility, although it is definitely settled under the law of this state that The Ohio Fuel Gas Company in selling and delivering gas to a distributing company at wholesale is not a public utility; and, in so doing, the Commission substituted its judgment for that of The Ohio Fuel Gas Company, its officers and directors, as to the amount of natural gas leaseholds which it may carry as a protection of its property used in this non-utility business, and this without any allegation or evidence of fraud or bad faith or abuse of discretion by, or on behalf of, The Ohio Fuel Gas Company, and in determining the cost to The Ohio Fuel Gas Company of the gas it sells and delivers to the applicant, it erroneously excludes from the operating expenses of The Ohio Fuel Gas Company the rentals, taxes and other carrying charges of said natural gas leaseholds Classes 2, 3 and 4.

[fol. 337] (45) The United Fuel Gas Company is a corporation under the laws of West Virginia, having its principal place of business and conducting its business and activities in that state, so far as they relate to this proceeding; that a price charged by the United Fuel Gas Company to The Ohio Fuel Gas Company for gas which is fair and reasonable, or determined by methods which are recognized as fair and reasonable under the laws of West Virginia cannot lawfully be held to be unfair or unreasonable, because of the common ownership of the stock of the

said United Fuel Gas Company and The Ohio Fuel Gas Company in the absence of a finding or evidence of fraud or bad faith; nevertheless, the Commission in determining what is fair to be paid the United Fuel Gas Company by The Ohio Fuel Gas Company for gas eliminates from the factor determining such price elements which are recognized by the laws of West Virginia as just and proper, to-wit, the taxes, rentals and other carrying charges of unoperated natural gas leaseholds, that is, leaseholds of Class 2, 3 and 4.

(46) The allocation percentages used by the Commission for the purposes of apportioning or allocating the expenses of the United Fuel Gas Company to the business of The Ohio Fuel Gas Company are arbitrary and/or inconsistent with the findings of the Commission.

(47) The rate of return under the order of the Commission herein, neither assures nor permits confidence in the financial soundness of this applicant or of The Ohio Fuel Gas Company or of the United Fuel Gas Company, and is inadequate, under efficient and economical management, to maintain and support this applicant's credit and/or the credit of said other companies, and to enable this applicant or said other companies to raise the money necessary for the proper discharge of their duties.

22. There are other errors apparent on the face of the record prejudicial to the rights of this applicant.

Wherefore this applicant, The Dayton Power and Light [fol. 338] Company, prays the Commission to grant a rehearing herein, and to modify, vacate and set aside said order of November 3, 1932, and pending this application for a rehearing to suspend said order, and if same be not vacated to fix an effective date for the operation of said order which will enable the merits of this case to be passed upon by the Supreme Court of Ohio and the case to be finally adjudicated by that Court before said order shall become effective, to the end that the rights and interests of this applicant, as well as of all parties in interest, may be protected, and for all other relief to which applicant may be entitled.

The Dayton Power and Light Company, by ——— ———, ——— ———, Its Attorneys.

[fol. 339] BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

[Title omitted]

PROTEST OF VALUATIONS

In this protest the City of Sidney, the City of Washington, also known as Washington Court House, the City of Troy, territory outside of and adjacent and contiguous to the corporate limits of Troy, the Village of North Hampton and territory contiguous and adjacent thereto, the Village of South Charleston and Wilberforce, all situated in the State of Ohio, are collectively designated as "the Towns", and The Dayton Power and Light Company is designated as "Protestant."

1. The evidence of the Protestant, which is uncontradicted, shows the value of its property used and useful for the convenience of the Towns and their inhabitants in supplying natural gas service to them is $1,250,221, excluding therefrom the value of any franchise or right to own, operate or enjoy the same in excess of the amount (exclusive of any tax or annual charge) actually paid to the towns or any of them, as the consideration for the grant of such franchises or rights or any of them, and exclusive of any value added thereto by reason of a monopoly or merger.

The Commission reduced this valuation in the sum of $381,834 and in effect fixed and determined same to be $868,387, as appears by the schedule attached to finding of fact of November 3, 1932, to which action of the Commission Protestant objects, protests and excepts.

[fol. 340] Said reduction consists of the following particulars and items:

Organization expenses, eliminated	$24,774
Cost of financing, eliminated	39,600
Going concern value, eliminated	125,000
Cost of cutting and restoring paving, eliminated	139,545
Working capital reduced in the sum of	21,320
General overheads reduced in the sum of	31,595
Total reduction	$381,834

Said reductions and eliminations and each of them are contrary to the evidence and law and are erroneous and in contravention of the provisions of the Fourteenth Amendment to the Constitution of the United States, in that they deprive Protestant of its property without due process of law and deny it the equal protection of the laws.

2. In filing this protest Protestant does not admit the right, power or authority of the Commission in this proceeding to inquire into or fix the valuations of the properties of either The Ohio Fuel Gas Company or United Fuel Gas Company, as it did in its order and finding of October 3, 1932, in Proceeding No. 5935 before the Commission, which was adopted in this proceeding.

In referring to exhibits relating to The Ohio Fuel Gas Company and United Fuel Gas Company, the numbers herein used are those in copy of evidence in proceeding No. 5935 before the Commission, which by stipulation have been part of the record and evidence in this proceeding.

This Protestant protests said valuations made of the property of The Ohio Fuel Gas Company and United Fuel Gas Company for and upon the following reasons and grounds, and in the following respects, viz.:

[fol. 341] 3. This Commission has no right, power or authority to fix the value of the property of The Ohio Fuel Gas Company in this proceeding. Said the Ohio Fuel Gas Company is not a public utility in respect of the natural gas sold and/or delivered by it to The Columbus Gas and Fuel Company or to this Protestant.

4. That the valuation found by the Commission is contrary to the evidence, is not supported by the evidence, is manifestly against the weight of the evidence and is not the true value of all the property of The Ohio Fuel Gas Company actually used and useful for the convenience of the public, excluding therefrom the value of any franchise or right to own, operate or enjoy the same in excess of the amount (exclusive of any tax or annual charge) actually paid to any political subdivision of the state or county as a consideration for the grant of such franchise or right; and exclusive of any value added thereto by reason of a monopoly or merger. The value so fixed by the Commission will result in a confiscation of said The Ohio Fuel Gas Company's property and will deprive said Company of its

property without due process of law and deny to said Company the equal protection of the law, contrary to the provisions of Section one of Article Fourteen of the Articles in Addition to and Amendment of the Constitution of the United States.

5. The Commission erred in admitting, receiving and/or relying upon the evidence, or any part thereof, of the witnesses Harry R. Allensworth and J. Paul Blundon for the reason that said Allensworth and Blundon did not possess the necessary training, education and/or experience which gave them any peculiar knowledge in respect of the subjects and matters to which they testified.

6. The Commission erred in overruling the objections to the testimony and exhibits introduced by and through the witness Harry R. Allensworth.

[fol. 342] 7. The Commission erred in overruling the objections to the testimony and exhibits introduced by and through the witness J. Paul Blundon and especially to that testimony and those exhibits of said Blundon which were predicated upon the testimony and exhibits of the witness Harry R. Allensworth.

The action of the Commission as per paragraphs 8 to 14 was error:

8. The elimination of the cost of Organization in the amount of $1,999,922.00 and the failure to make any provision for the cost of organization.

9. The elimination of Incomplete Construction of the value of $234,295.00 or any part thereof.

10. In accounts 258 to 266, inclusive—Undistributed Construction Expenditures: The elimination of $481,224.00 of reproduction cost new value and $2,539,939.00 reproduction cost new less depreciation, contrary to the evidence in the above entitled proceeding and contrary to the practice of this Commission in other cases.

11. The failure of the Commission to allow the Cost of Financing which would necessarily be incurred in the reproduction of the property of The Ohio Fuel Gas Company, and which the Commission is authorized to recognize and allow by subsection G of Section 499-9 of the General Code of Ohio was error.

12. The placing of an inadequate valuation on the No. 1 acreage, contrary to the evidence in the above entitled proceeding.

13. The elimination of all value for No. 2 leaseholds which the testimony in the above entitled proceeding shows to be now used and useful and necessary for supplying natural gas during the term of the ordinance herein appealed from in proceeding No. 5935.

[fol. 343] 14. The elimination of all value for No. 3 and 4 classes of leaseholds, which the uncontroverted evidence in this proceeding shows to be necessary to the conduct of the business of The Ohio Fuel Gas Company in supplying natural gas to this Protestant to enable it to supply natural gas service to the towns for three years and two months from July 17, 1929.

15. The Commission erred in refusing to admit competent and relevant testimony tending to show that there is a market for natural gas leaseholds and tending to show the value of such leaseholds in the markets.

16. The Commission erred in holding that The Ohio Fuel Gas Company had a monopoly within its own field in the matter of natural gas leaseholds. Company exhibits Nos. 142, 143, and 144 and Company Exhibit No. 139 show that the various leaseholds, including all of The Ohio Fuel Gas Company's operated acreage, are located contiguous to leaseholds owned and operated by others. Leases of gas bearing lands, owned and operated by others are interspersed throughout the entire territory of The Ohio Fuel Gas Company's leaseholds.

17. The Commission erred in its finding of October 3, 1932, in said proceeding No. 5935, adopted in this proceeding.

"That inasmuch as the Supreme Court has held that the nonproductive acreage may not be considered in fixing the rate base, it must logically follow that the expense of carrying that nonproductive acreage may not be considered as a part of the maintenance of the system which has at its command other acreage which is actually producing gas and is therefore used and useful."

In view of other findings made by the Commission in respect of said leaseholds, its deduction instead of being logical in a non sequitur and for the following reasons, to-wit:

At page 8 of its findings this Commission found:

"The Company did present a mass of testimony touching every detail of the great system which has been built up for the purpose of acquiring and developing gas land [fol. 344] throughout the State of Ohio, West Virginia and to some extent in Kentucky, and of the transportation of gas from the fields to the points of ultimate distribution. In addition to the lands now used as a present source of supply, it also developed the fact that the company holds in reserve under lease hundreds of thousands of acres of lands not yet developed but which are a potential reservoir which must be controlled in order that a continuous supply of gas may be assured such as will justify the investment of large sums of money in transportation and distribution systems."

At page 14 of its findings this Commission found:

"Large gas companies, and especially the one now under consideration, have pursued the policy of acquiring, under lease, not only gas lands which have been tested and are known to be gas producing, but also other lands adjacent thereto, which from a geological study and their proximity to tested lands give promise of supplying a reservoir from which gas may be drawn through a long period of years."

At page 18 of said findings it was found by the Commission:

"It is urged by the Company that a wise business policy dictates that future requirements must be provided for to testify the expenditure of large sums of money in transportation and distribution facilities. It is insisted that the control of large reservoirs of gas for future use is the very foundation of the stability of the company and that without such reserve the company could not in justice to itself spend the sums necessary for transmission lines and for distribution within municipalities. It is insisted that it would be the height of folly to venture large sums which would be lost to the Company if it were deprived of the

back-log of gas reserves, and it is pointed out that unless the Company secure to itself these gas lands for future development, a rival company might come into the field and lease the lands placing the present company at the mercy of its rival, when it has exhausted the gas beneath what is now designated as productive acreage.

"It is insisted that while the Supreme Court in the Logan Gas case referred to decided that unproductive lands could not be considered in fixing the base valuation, yet the question was not squarely placed before it as to whether or not the expense of carrying this acreage was a proper maintenance charge to be paid out of the income of the company, to be charged against the present rate payer.
[fol. 345] "It must be admitted that there is much force in the contention of the company. On the other hand it is urged that the present rate payer should not be penalized by a higher rate to take care of the future rate payer. It is urged that, if the company as a matter of policy, decides to secure to itself gas reserves which are not at present used and useful that that is no concern of the present rate payer who is obliged to pay only a proper return upon the property used and useful."

The evidence showed and the Commission found that the average remaining life of the No. 1 leaseholds was three years and two months. Notwithstanding the Commission allowed only the value of leaseholds which would be exhausted within three years and two months from the — day of December, 1929, the Commission made the assumption that The Ohio Fuel Gas Company had an inexhaustible supply of gas and the Commission predicated its annual allowance for depreciation reserve on the property of The Ohio Fuel Gas Company upon the assumption of such inexhaustible supply of gas, and refused to allow anything for obsolescence or amortization on the admitted used and useful property of The Ohio Fuel Gas Company except for No. 1 leaseholds, Account 211—Gas Well Construction and Account 212—Gas Well Equipment. It is respectfully protested that the annual allowances for depreciation, obsolescence and/or amortization should be based upon the life of the leaseholds considered in the valuation. In other words, the protest here is to the assuming by the Commission of a remaining life of sixty-six and two-thirds

years for calculating depreciation on all of the depreciable property of The Ohio Fuel Gas Company except Account 211—Gas Well Construction, Account 212—Gas Well Equipment and No. 1 leaseholds, and not allowing in the rate base leaseholds or gas lands actually owned and held by the company necessary for a supply of natural gas beyond a period of three years and two months from the effective date of the ordinance appealed from in said proceeding No. 5935.

The Commission has found that it is the policy of the company to carry the reserve acreage. No criticism is made by the Commission of the amount of reserve acreage actually held by the Company. The undisputed evidence in the case by every witness competent to speak thereon is [fol. 346] that all of the gas lands, including classes Nos. 1, 2, 3 and 4, which except for the purposes only of appraisal are known in the industry as, respectively, operated and unoperated, are used and useful in the business of The Ohio Fuel Gas Company in supplying gas to the Columbus Gas and Fuel Company and/or this protestant. If The Ohio Fuel Gas Company must pay delay rentals out of the six and one-half per cent return on the rate base herein fixed, then the net return of The Ohio Fuel Gas Company on such rate base will be reduced to less than 4.24 per cent, with the effect that the gate rate herein fixed will result in confiscating and depriving The Ohio Fuel Gas Company of its property without due process of law and denying to said Company the equal protection of the law, contrary to said provisions of said Fourteenth Amendment.

18. The elimination from said valuation of all Going Concern Value. Such action of the Commission is contrary to the evidence, is not supported by the evidence and will deprive the Ohio Fuel Gas Company of its property without due process of law and deny to said Company the equal protection of the law, contrary to said provisions of said Fourteenth Amendment.

19. The allowance of an inadequate amount for Working Capital, Materials and Supplies, insufficient for said The Ohio Fuel Gas Company to transact its business in the ordinary way, and contrary to the established practice of this Commission of allowing a sum equal to five per centum of the present value of a utility's physical property for working capital, materials and supplies was error.

20. The method of ascertaining the present value of the property described in Account 211—Gas Well Construction was error.

21. The method of ascertaining the present value of the property described in Account 212—Gas Well Equipment was error.

[fol. 347] 22. The depreciating below the cost of reproduction new of the Undistributed Construction Expenditures (General Overheads), for which the Commission made no allowance for annual depreciation reserve was error.

23. The Commission has no right, power or authority to fix the value of any property of a public utility or other corporation situated outside of the State of Ohio and which, so far as the proceedings herein are concerned, does no business within the State of Ohio, even though the common stock of said utility or other corporation be owned by the same corporation which owns the common stock of protestant.

24. That the valuation found by the Commission is contrary to the evidence, is not supported by the evidence, is manifestly against the weight of the evidence and is not the true value of all the property of said United Fuel Gas Company actually used and useful for the convenience of the public, excluding therefrom the value of any franchise or right to own, operate or enjoy the same in excess of the amount (exclusive of any tax or annual charge) actually paid to any political subdivision of the state or county as a consideration for the grant of such franchises or right; and exclusive of any value added thereto by reason of a monopoly or merger. The value so fixed by the Commission will result in a confiscation of said United Fuel Gas Company's property and will deprive said Company of its property without due process of law and deny to said Company the equal protection of the law, contrary to the provisions of Section one of Article Fourteen of the Articles in Addition to and Amendment of the Constitution of the United States.

25. This Commission has no right, power or authority to eliminate all going concern value. The elimination of going concern value is contrary to the evidence, is not

supported by the evidence and will deprive said United Fuel Gas Company of its property without due process of law and deny to said company the equal protection of the law, contrary to said provisions of said Fourteenth [fol. 348] Amendment.

26. The allowance for Construction Overheads is insufficient and is contrary to the evidence.

27. The valuation of the leaseholds is contrary to the evidence and contrary to law.

28. The valuation of the Gas Well Equipment is contrary to the evidence and contrary to law.

29. The allocation percentages used by this Commission for the purpose of apportioning or allocating the value of the property of United Fuel Gas Company to the business of The Ohio Fuel Gas Company are arbitrary and/or inconsistent with the findings of this Commission.

30. The Commission erred in its computation of the amount of working capital of The United Fuel Gas Company allocable to the business of that company other than West Virginia regulated business.

The Dayton Power and Light Company, by Edwin P. Matthews, John E. Mullin, Chester J. Gerkin, Charles P. Pfarrer, Its Attorneys.

[fol. 349] Before the Public Utilities Commission of Ohio —

[Title omitted]

Order Overruling Protest of Valuations

This day, this matter came on to be heard, and was heard, upon the pleading proffered by the respondent, The Dayton Power and Light Company, denominated, Protest of Valuation, and

It appearing that such protests do not properly lie in this proceeding, it is,

Ordered, that the same be, and hereby the same is overruled.

To which order of the Commission, said The Dayton Power and Light Company then excepted, here now excepts, and its exceptions here are noted of record.

The Public Utilities Commission of Ohio, E. J. Hopple, Chairman; John W. Bricker, Frank W. Geiger, Commissioners.

Dated at Columbus, Ohio, this 2nd day of December, 1932.

A true copy:

Ira E. Sprankle, Superintendent of Investigation.

(Seal The Public Utilities Commission of Ohio.)

[fol. 350] BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

[Title omitted]

ORDER DENYING REHEARING.

This day, this matter came up for further consideration upon the application of the respondent, The Dayton Power and Light Company, asking, for the reasons and upon the grounds set forth therein, a rehearing with respect to the matters and things decided and determined by the finding and order made and entered November 3rd, 1932.

The Commission, being fully advised in the premises, finds that sufficient cause has not been made to appear in said application for a rehearing of this proceeding. It is, therefore,

Ordered, that the application of the respondent herein, The Dayton Power and Light Company, asking, for the reasons and upon the grounds set forth therein, a rehearing with respect to the matters and things decided and determined by the finding and order made and entered November 3rd, 1932, be, and hereby it is, denied.

To which order of the Commission denying said application, the respondent, said The Dayton Power and Light

Company then excepted, here now excepts, and its exceptions here are noted of record.

The Public Utilities Commission of Ohio, ——— ———, Chairman; John W. Bricker, Frank W. Geiger, Commissioners.

Dated at Columbus, Ohio, this 20th day of December, 1932.

A true copy:

Ira E. Sprankle, Superintendent of Investigation.

(Seal The Public Utilities Commission of Ohio.)

[fol. 351] BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

[Title omitted]

MOTION TO SUSPEND EFFECTIVE DATE OF ORDER

The Dayton Power and Light Company informs the Commission that it has filed an Application for Rehearing of the order of the Commission made in the above entitled and numbered proceeding of November 3, 1932, and of the matters upon which said order was based, and moves the Commission to suspend and postpone the effective date of said order until January 3, 1933, pending action of the Commission upon said Application and filing a petition in error in the Supreme Court if said Application should not be granted.

The Dayton Power and Light Company, by Edwin P. Matthews, John E. Mullin, Chester J. Gerkin, Charles P. Pfarrer, Its Attorneys.

[fol. 352] BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

[Title omitted]

ORDER EXTENDING EFFECTIVE DATE OF ORDER

This day, this matter came on to be heard, and was heard, upon the application of the respondent, The Dayton Power

and Light Company for a postponement of the effective date of the order made and entered herein November 3rd, 1932, to January 3rd, 1933 to permit of the respondent perfecting its appeal to the Supreme Court of Ohio, whereupon, and for good cause, it is,

Ordered, That the effective date of the order entered herein November 3rd, 1932, be, and hereby the same is extended to January 3rd, 1933.

Dated at Columbus, Ohio, this 2nd day of December, 1932.

A true Copy:

Ira E. Sprankle, Superintendent of Investigation

The Public Utilities Commission of Ohio, E. J. Hopple, Chairman; John W. Bricker, Frank W. Geiger, Commissioners.

[fols. 353–355] IN SUPREME COURT OF OHIO

No. 23893

THE DAYTON POWER & LIGHT COMPANY

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO

ORDER SUSPENDING ORDER OF COMMISSION—January 4, 1933

This cause coming now to be heard on the motion of plaintiff in error filed December 21, 1932, asking this Court to stay and suspend the order of the Public Utilities Commission of Ohio of November 3, 1932, complained of herein, until the further order in this case, the Court having heard the arguments of counsel and being fully advised in the premises, upon consideration sustains said motion, and accordingly said order of said Commission is stayed and suspended until the further order of this Court upon the plaintiff in error giving and filing with the Clerk of this Court an undertaking to his satisfaction in the sum of Fifty Thousand Dollars ($50,000.00) conditioned in accordance with section 548 of the General Code of Ohio.

The Court reserves the right and jurisdiction to require an additional undertaking of plaintiff in error if the Court should at any time deem same necessary or proper.

Carl V. Weygandt, C. J.

Agreed to:

E. P. Matthews, John E. Mullin, Chester J. Gerkin, Charles Pfaffer, Attorneys for Plaintiff in Error.
Thomas J. Herbert, Attorney for Defendant in Error.

[fol. 356] Before Public Utilities Commission of Ohio

Statement of Evidence

A. On Valuation of Appellant's Property

[fol. 357] F. H. Lerch, Jr., testified.

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[fol. 358] F. H. Lerch, Jr., called on behalf of the Dayton Power & Light Company, being first duly sworn, testified as follows:

Examined by Mr. Mullins:

Q. Your name is what?
A. F. H. Lerch, Junior.

Commissioner Klinger: F. H. Lerch?
Mr. Mullins: L-e-r-c-h.
The Witness: L-e-r-c-h.

Q. Mr. Lerch, what is your business?
A. I am an employee of Ford, Bacon & Davis, engineers, of New York; at the present time engaged in the management of natural gas properties for them in Louisiana and in doing valuation work for them in other parts of the country.
Q. Of what college are you a graduate, Mr. Lerch?
A. I am a graduate of Lafayette College at Easton, Pennsylvania.
Q. What year did you gradnate?
A. The year 1909.
Q. What has been your business and professional experience in that time so far as it may be pertinent to these proceedings?

A. After graduation from college, I went with the Empire Steel & Iron Company, the main office of that company at that time was at Catasauqua, Pennsylvania. They operate four blast furnace plants in Pennsylvania and New Jersey and two iron ore mines in New Jersey. I started as an assistant chemist in the laboratory and stayed with them for four years, during which time I was store keeper, time keeper, furnace boss and superintendent of an operating plant. I also spent considerable time at the iron ore mines where the company was spending a large sum of money

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[fol. 359] in the rehabilitation of the mines, and in further development or iron ore deposits in New Jersey. My work during all of this had to do with the operation, the management, and the cost of expenditures for operation, management and construction of the properties.

In 1914, I went with the T. A. Gillespie Company, engineers and contractors in New York City, who were engaged at the time in the reconstruction of the elevated structures in the City of New York. These structures were rebuilt on the Second and Third Avenue lines, on the Ninth Avenue line and part of the Sixth Avenue line. My duties of this work had to do with the keeping of the cost of construction, the preparation of estimates and required that I be out on the job observing the work about a third of the time.

After 1917, I went with the Munitions Companies of the T. A. Gillespie Company as Second Assistant to the Vice President and General Manager of those companies. The Munitions Plants furnished a large quantity of high explosive ammunition in the shape of shells for the United States Army and I stayed with them until the end of the War, and in 1919 went as civilian property manager in the Army Ordnance Office in New York District. The work of this Office after the close of the War was principally in the settlement of claims with government contractors. These claims involved the settlement for materials furnished by the Government for plants built at government expense and for commodities contracted for and entirely or partly delivered.

In August, 1920, I went with Ford, Bacon & Davis, with whom I am still employed.

My work with Ford, Bacon & Davis has been principally
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[fol. 360] natural gas work; for about the first four years of that employment, I was directly assistant to Mr. C. P. Uebelacker, a member of the firm who was then engaged in the preparation of a great deal of valuation—rate-case—financial investigation of natural gas properties.

Q. Is Ford, Bacon & Davis a corporation?

A. Ford, Bacon & Davis, Incorporated, yes, sir.

Beginning practically with 1923, I had charge of the valuation and rate cases had discontinued right through until the present time although since 1926, I have spent a great deal of my time in the organization and operation of natural gas companies; spending my time since 1927, as general manager of the Interstate Natural Gas Company with headquarters at Monroe, Louisiana, and Vice President and General Manager of the Southern Gas & Fuel Company which has its headquarters at Baton Rouge, Louisiana.
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[fol. 361] Q. What is the document which has been identified as Exhibit Number 2, Mr. Lerch?

A. That is the report on the valuation as we found it, of the certain distribution plants of the Dayton Power & Light Company which we were instructed to consider.

Q. What were those plants?

A. They were the towns of North Hampton, Piqua, Sidney, South Charleston, Tippecanoe City, Troy, Washington Court House, Wilberforce and a certain territory designated as "adjacent to Troy".

Q. Mr. Lerch, before going into that in detail, will you please state for the information of the Commission, simply the total of the valuation as found by you, and the depreciation?

A. The estimated cost of reproduction as of June 30, 1929, new, was $1,415,813.00; and the estimated cost of reproduction as of the same date, less observed deterioration was $1,176,811.00.

Q. Will you please state the scope of that report which you have reported there—that is Exhibit Number 2.

A. The report covers an inventory made of the physical property of the Dayton Power & Light Company at the
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[fol. 362] several locations named which inventory has been priced at current reproduction prices, and an estimated

amount of deterioration deducted from this priced inventory. The report is intended to cover a general description of the property and of the methods followed in the inventory, at the pricing of the inventory and at the observation of deterioration together with the net result in detail of the details of the inventory.

Q. The valuation has been carried out in accordance with the Commission's classification of accounts, has it not?

A. The summary of valuation is set up in accordance with the prescribed code of accounts.

Q. The date certain as of which this valuation is made is of June 30, 1929, according to your statement?

A. Yes, sir.

Q. Is there any difference between that valuation as of that date and as of June 18 of the same year—or 19?

A. No, sir.

Q. How many customers or meters are in each of the several places involved in this proceeding, Mr. Lerch?

A. In the town of North Hampton is 131 meters; Piqua 4,689; Sidney, 2,762; South Charleston, 411——

Commissioner Bricker: May I ask what page you are on?

The Witness: Page 4.

Mr. Mullins: Page 4.

The Witness: Do you find it?

Commissioner Bricker: Yes.

The Witness: Tippecanoe City, 815; Troy, 2,617; territory adjacent to Troy, 130; Washington Court House, 2,393; Wilberforce, 71; a total of 14,019 meters as of June 30, 1929.

[fol. 363] OHMER E. HOWLAND testified:

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[fol. 364] Q. Have you been sworn, Mr. Howland?

A. Yes.

Q. What is your name?

A. Ohmer Howland.

Q. How old are you?

A. 44.

Q. Where do you live?

A. Village of Oakwood, adjacent to Dayton, Ohio.

Q. Before that you lived in Dayton?

A. Yes, sir.

Q. How long have you lived in Dayton—Dayton and Oakwood together?

A. About 20 years.

Q. What is your present occupation?

A. I am a director and secretary and treasurer of the Dayton Power & Light Company.

Q. How long have you been connected with the Dayton Power & Light Company and its predecessors, The Dayton Lighting Company?

A. About 22 years.

Q. How long have you been treasurer and secretary of the Dayton Power & Light Company?

A. About 13 years.

Q. How long have you been director of the company?

A. About 13 years.

Q. Mr. Howland, of what does the property known as the executive offices of the Dayton Power & Light Company consist?

A. They consist of land and buildings as located on First and St. Clair Street in the city of Dayton, Ohio, in which is housed all of the executive offices of the company.

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[fol. 365] Q. What is the dimensions of that property, do you know?

A. It is approximately 80 feet on First Street and 125 feet on St. Clair Street.

Q. What kind of a building is it that is on there?

A. It is a two story brick building.

Q. Is that building used in any way in connection with the gas business of the company, by the gas division of the company?

A. Yes, it is; it is used as an executive building for all the company's operations, which includes electricity and gas and heat.

Q. Have you examined the exhibits, Exhibit No. 2, introduced at the former hearing of the appraisement made by Ford, Bacon & Davis?

A. I have.

Q. Does it include any valuation on account of the executive offices building you have just spoken of?

A. It does not.

Q. Should any part of the value of that executive office property be allocated to the eight towns which are concerned in this hearing?

A. I think it should.

Q. Why?

A. Because all of the executive offices for all the company's activities are located in this building, all of the general accounting, the purchasing and matter of that character are handled from this building.

Q. What percentage of the value of that building should be allocated to the gas division?

A. I would say about 46 per cent.

Q. And what proportion of that 46 per cent. should be allocated to the eight towns involved in this hearing?

A. About 17 per cent. for them.

Mr. Mullin: 17 of the 46?

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[fol. 366] The Witness: 17 of the 46.

Q. As to the value of that building, have you communicated with someone in Dayton with reference to that?

A. Yes, I have, but I haven't the report on it yet. I have here the value which I feel is a fair value for that building and the land.

Q. All right, what is it—you know something about the value of property in Dayton, don't you?

A. Well, in a general way I think I do.

Q. Well, you know you do, don't you?

A. Yes, sure I do.

Q. You must. By golly, he has bought and sold some of it; he ought to know.

A. I am honest about it.

Q. What is the value of that executive building, the executive office property I mean to say?

A. Well, the executive office property I would say has a value of about $144,000.

Mr. Rush: Well, I don't think the witness has qualified as an expert.

Q. Mr. Howland, do you know about the purchases and sales and transfers of pieces of real estate in the general part of Dayton where the executive office property is?

A. To some extent I know quite a bit about it.

Q. Do you know of purchases and sales of property and have you heard what it sold for?

A. Yes.

Q. And you have a general knowledge of the value of the property in the business part of Dayton?

A. Yes.

Q. Is the executive office property in the business part of Dayton?

A. It is.

Mr. Matthews: Anything else you want to know about him? Are you satisfied with him as an expert?

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[fol. 367] Mr. Rush: Not by any means.

Mr. Enyeart: I don't think he has qualified as an expert. Go ahead and testify. He is not an expert, so far as real estate is concerned.

Mr. Rush: Might ask him if he is a real estate agent.

Mr. Matthews: No, he is not a real estate agent, but he knows just like I do—I can tell you the value of any piece of property in that part of Dayton.

Mr. Mullin: A witness on the value of real estate does not have to be a real estate broker.

Mr. Matthews: Judge Geiger can tell you the value of any piece of property on Main Street in Springfield.

Mr. Enyeart: Be careful.

Mr. Matthews: Why, I know he knows what it is worth.

Chairman Geiger: Now, you allocate 17 per cent of this particular transaction to this executive property; is that the portion of the business done by the gas company of all the business done in that building?

The Witness: On this basis, Your Honor; on the basis of the number of customers, electric customers and gas customers.

Chairman Geiger: Well, would it be——

The Witness: Now, it would be of the total gas division of the company which includes all of its gas operations; 46 per cent is the ratio of the gas meters to the total number of combined electric and gas meters.

Chairman Geiger: You think it is a fair test to allocate the different values of the property to the different cities by virtue of the number of meters that are out for the several purposes?

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[fol. 368] The Witness: I think so.

Chairman Geiger: Rather than the amount of income?

The Witness: I think so. I think the basis of meters is better than anything.

Chairman Geiger: Well now, have you included of your executive offices any of the office up there that has been devoted to the sale of electrical equipment or gas equipment?

The Witness: There is none of this office building devoted to that purpose.

Chairman Geiger: Is any portion of the office building devoted to the business end of the sale of equipment—you have your bookkeeper?

The Witness: A very, very slight—there is probably a space there about 6 by 6 feet.

Chairman Geiger: That you just——

The Witness: But it is so trivial that I do not think you would want to consider it.

Chairman Geiger: All right.

Q. Mr. Howland, what is the service building property of the Dayton Power & Light?

Chairman Geiger: Will you permit me to ask one question: your engineers have reconstructed that building; how does your statement as to what it is worth comply or correspond with the reproduction?

Mr. Mullin: I do not think the Commissioner gets the question.

Mr. Matthews: It is not included.

Chairman Geiger: You mean by that——

Mr. Matthews: The one that I am talking about has been omitted.

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[fol. 369] Chairman Geiger: Does not come within that 2 per cent?

Mr. Matthews: Only in this—this evidence, Your Honor, in justification of the percentage here for omissions and contingencies. You recollect it was testified here that in an appraisal there was always something omitted and which ought to be included in the final valuation, and you here are two important properties that somehow or other have been overlooked by the engineers who made Exhibit No. 2.

Commissioner Bricker: Do you think we ought to cut down on the 2 per cent, Judge, since we found them?

Chairman Geiger: We have not allowed them both, that which you are putting in——

Mr. Rush: Does not speak very well on the carefulness of the appraisal if they would omit two.

Mr. Pfarrer: It speaks very highly for the smallness of the percentage of omissions, though.

Mr. Matthews: What is it, Mr. Lerch?

Mr. Lerch: Cut the 2 per cent out and put the buildings in.

Q. Mr. Howland, what is the service building property of the Dayton Power & Light Company; where is it located?

A. The service building property of the Dayton Power & Light Company is located in the city of Dayton on the main corner of Monument and Foundry Streets. The land is approximately 153 feet front on Monument Avenue and 180 feet on Foundry Street. All of this land is covered by a four story brick and concrete building. The value of that land and building is approximately a half a million dollars.

Q. For what is the building used?

A. That building is used for the housing of our trans- 597

[fol. 370] portation department, our general stores department, the offices of our distribution, superintendents, engineers, their clerks, all records pertaining to the company's operations, both gas and electricity, the engineers' offices, the drafting rooms, and some of our accounting offices.

Q. It is entirely devoted to our utility business, is it not?

A. Exclusively.

Q. No appliances sold there or handled there?

A. No.

Mr. Mullin: The stenographer don't get the shake of your head.

The Witness: No, there is no appliance sold from there.

Chairman Geiger: Are they stored there?

The Witness: Well, there might be some little there, Judge.

Mr. Matthews: Might what?

The Witness: There might be some few appliances stored there.

Chairman Geiger: He said sold there; I am asking about stored there.

The Witness: There might be some stored there, Judge.

Q. Where is this property in reference to the business part of Dayton?

A. It is in the section of Dayton adjacent to part of the industrial section, near the plants of the General Motors Corporation, near the Egry Registry Building and the Dure Pump & Manufacturing Company, and it is, I will say, about four to six squares off of the business center of the city.

Q. That is off of Main Street?

A. Yes.

Chairman Geiger: It is on Monument?

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[fol. 371] The Witness: Monument Avenue.

Mr. Matthews: Monument Avenue?

Chairman Geiger: East Monument?

The Witness: East Monument.

Chairman Geiger: Further east than the Engineers' Building?

The Witness: Yes, about two squares beyond it.

Chairman Geiger: On the south side of the street?

The Witness: No, it is the north side.

Chairman Geiger: This is the Delco Light?

Mr. Matthews: How?

Chairman Geiger: Isn't that the Delco Light Plant?

The Witness: The Delco Light plant is further out, this is on First Street you are think about.

Mr. Matthews: This is on Monument Avenue.

The Witness: Right opposite the Big Four Railroad freight yard there.

Mr. Rush: Judge, that dilapidated looking place.

The Witness: No, that nice looking place, Judge.

Mr. Matthews: That dilapidated lies——

The Witness: I don't think you will find it very dilapidated.

Q. Is the service building used in any way in connection with the gas division of the company?

A. Yes.

Q. Explain that, please.

A. We store materials for our gas division in this building, our transportation for gas division is housed and repaired there; the gas engineers and the superintendent of

our gas property is located in this building; our drafting department for the gas division is also located here. The

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[fol. 372] meter records for the gas division are kept there and it in general is the service building for both gas and electricity.

Q. Is any part of the valuation of the service building property included in Exhibit No. 2 which has been introduced in here?

A. There is not.

Q. What percentage of the value of that building is properly allocable and should be allocated to the gas division of the company—of that property?

A. The same ratio that I stated before with reference to the executive building.

Q. That is what?

Chairman Geiger: What?

The Witness: The same ratio as I stated before.

Chairman Geiger: 47 per cent?

Mr. Matthews: 46 per cent.

The Witness: 46 per cent to the gas division and about 17 per cent to these eight towns in question here.

Q. And how do you arrive at those percentages?

A. I took the total number of electric meters and the total number of gas meters and the total value of this property apportioned from the number of gas meters to the total number of all meters, which was 46.72 per cent to be exact. Within these eight towns is 16.83 per cent of the 46.72 per cent.

Chairman Geiger: How much did you value that building, now—$500,000?

The Witness: Valued the land and building at $500,000.

Mr. Matthews: If I were on the witness stand I would put it higher.

Mr. Mullin: Take the stand.

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[fol. 373] Mr. Matthews: He and I don't quite agree on that.

Chairman Geiger: How much higher do you want it, Judge—$500,000 higher?

Mr. Matthews: Well, my recollection was that the building cost about $500,000, and I think that land out there is worth $1,000 a front foot on Monument Avenue.

Mr. Enyeart: Real estate has gone down.

Mr. Matthews: Not over there it hasn't.

Chairman Geiger: Well, you approximate—we will say you estimate the value of that building allocated to the particular towns on which the rate is now in question at $85,000, 17 per cent. of $500,000, isn't that right?

The Witness: No. You take 47 per cent. of your $500,000 and then take 17 per cent. of that.

Chairman Geiger: Oh, I see—46 per cent.?

The Witness: 47 is nearer, round figures.

Q. Mr. Howland, is there any other property in the neighborhood that we have been talking about, the valuation of which has been omitted from the Exhibit No. 2?

A. Yes, the meter shop on the south side of Monument Avenue which has a frontage of 175 feet on Monument Avenue with approximately about 40 feet depth.

Q. Oh, that is that triangle up there?

A. No, that is the meter shop.

Q. All right.

A. Right. Well, it is about a square and a half off of Main Street on Monument Avenue. It is the building in which we test and repair meters.

Q. What kind of meters?

A. Gas meters only, and that building is used exclusively for our gas department.

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[fol. 374] Q. What is the value of that property?

A. The value of that ground there I estimate——

Q. Well, you say the property.

A. Well, the building—on this property is a building, two story brick building approximately 135 by 38 feet. The value of the ground and the building is approximately $65,000. In addition to these buildings there is also omitted in this——

Commissioner Bricker: What is the value of that two story brick, did you say?

Mr. Matthews: He said that was worth $65,000.

Chairman Geiger: What building is that?

Mr. Matthews: The meter building where they test all of the gas meters.

Chairman Geiger: Is that a part of this $500,000?

Mr. Matthews: No.

The Witness: No, sir, it is another building entirely.

Chairman Geiger: It is another one—value how much?

The Witness: $65,000, ground and building.

Commissioner Bricker: The same percentage would run through it?

Mr. Matthews: No, this is used exclusively by the gas division.

Commissioner Bricker: I know, but allocated.

Q. How much of this value of this meter building property should be allocated to the 8 towns involved in this proceeding?

A. Well, in my estimate here I used it all on the same basis.

Mr. Matthews: 17 per cent.

Commissioner Bricker: Did you test the meters in it, local towns?

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[fol. 375] The Witness: Oh, the new meters are brought into this shop and are tested before they are distributed to these different communities.

Commissioner Bricker: You use it for the testing of all then for Dayton and for the storage building for the other communities?

The Witness: We use it for a testing building for the entire district, that is the entire gas division and also for storage for the entire gas territory. If there should be more meters in the district than we want to keep there, we would pull them into the central store.

Commissioner Bricker: How many meters from Washington Court House and Tippecanoe City and the other towns involved in this hearing, do you test in that building?

The Witness: I could not answer that question.

Commissioner Bricker: Do you test any?

The Witness: We do.

Commissioner Bricker: Only when they are new?

The Witness: Well, some of those meters, we bring them from the districts, we bring into the general meter shop for test.

Commissioner Bricker: Then what do you do with them?

The Witness: Put them in stock and then send them back to the district from which they came.

Commissioner Bricker: Or use them in Dayton?

The Witness: Possibly either way. If we use those meters in Dayton we would send them new meters.

Commissioner Bricker: How much space is there devoted to the purpose of testing meters and storing meters in these

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[fol. 376] separate towns?

The Witness: How much space—that is all set forth in the valuation; I can't give it to you offhand.

Commissioner Bricker: You say 18 per cent. then of the 65?

The Witness: 16.83. There is also eliminated from this valuation——

Mr. Matthews: You mean omitted?

The Witness: Omitted here—I think I had in there first is the office equipment and then executive office building of which I spoke also then our customers' and accounting department which is a rented building and located at 20 South Jefferson Street, Dayton, Ohio, or the corner of Third and Jefferson Streets. All of that office equipment I would say was worth at least $130,000.

The Witness: The question you asked?

Chairman Geiger: What is this, mahogany or rosewood?

The Witness: Well no, it is not mahogany; it is good oak material.

Chairman Geiger: How many of them are in there?

The Witness: How many—there is about 250 employees involved.

Q. What proportion of the value of this property should properly be allocated to the gas division?

The Witness: On the same percentage that the other is allocated, which is the basis of the number of meters in the company's operations for electric meters, gas meters, and also the number of meters in these eight towns which are

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[fol. 377] in this proceeding.

Q. That would be 46 per cent. of the whole allocated to the gas division and 17 per cent. to these eight towns?

A. Yes.

Q. How much then would that 17 per cent. amount to?

A. Well, on all of this property that is omitted the total would be $839,000 of which $391,981 would be applicable to

the gas division and of that amount $65,970 should be a part of these proceedings involving these eight towns.

[fol. 378] (1) Organization or Preconstruction Costs.

[fol. 379] F. H. Lerch, Jr., testified:

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[fol. 380] Organization cost is based upon the percentage of two and a half per cent. of the distribution system and general property. This organization cost includes the time and expenses of the promoter's or organizers of the idea of serving gas in these several towns, the time that they spend and the expenses incurred in interesting others in the proposition; in the compiling of data as to the market, the supply of gas and the financial requirements, and in interesting bankers to finance the construction.

There is nothing included in this allowance for a promoter's fee or profit. This is designed to cover only the time and expenses of such pre-construction or organization costs. It also includes preliminary legal expenses, preparation of charter and such associated matters.

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[fol. 381] Q. Will you explain the various items there?

A. Well, Page 14 is the summary classified by Commission accounts for the various items of property, some of the overheads which we have considered, excepting the cost of financing, are assigned the proper commission number in this summary:

For instance, organization expense is Account Number 200 and engineering and administration, law, insurance, taxes and interest expenditures take the Commission numbers of 258 to 266 excluding 263, as set forth in the Com-

[fol. 382] mission Code of Accounts under the head of

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"Undistributed construction expenditures during construction."

Q. Did you testify as to organization?

A. Yes, sir.

Q. What can you say as to the amount set forth in that item here, $24,774.00?

A. I think that is a very reasonable sum on the estimates we have followed.

[fol. 383] By Mr. Tatem:

Q. In this matter of organization costs appearing on Page 9, estimated at 2.5 per cent, do I understand that that is not carried over into your costs on Page 14?

A. Yes, that is the very first item.

Q. Oh, yes.

A. That is, commission account Number 200.

Q. Yes, that is $24,774.00?

A. Yes, sir.

Q. And you say on Page 10 that is organization cost—

[fol. 384] in costs for the development or promotion of the enterprise including services and expense of organizers and promoters and then state other expenses; now, in the expense of organizers, promoters, to what extent have you made an inclusion in a percentage or any other for that item?

A. I might say that that item is pretty definitely described in the definition of Account Number 200 in the code of accounts itself as issued by the Commission. We have found from repeated inventories and estimates that two and a half per cent is a fair allowance for this particular expense on the reproduction basis such as this. In the independent building of a project, it would be considerably higher than two and one half per cent.

Q. Does that include profits of promoters?

A. It does not include any profits to the promoters; it includes simply the time and the expense of the promoters and the office help which is necessary, the preliminary work done to prove the feasibility of the project and to investigate the supply and the market and whether it is worth while interesting financial people in the project as a whole.

Q. Isn't a promoter worthy of his hire in the way of profits?

A. The promoter is worthy of his hire and he usually gets some recompense in the shape of an interest in the company that he is promoting. We could not include that in.

Q. In that way, wouldn't it be a proper enclosure?

A. If he were paid in cash, we might consider including it, but he is not—so very seldom paid in anything except securities.

Q. In making an estimate of this sort, how would you choose between one method or the other?

A. Well, we assume that it is not reasonable to include

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[fol. 385] in here more than his out-of-pocket expenses, and the cost of promoting the enterprise.

Q. And yet on Page 6, you refer to promotion profits as being a proper element of value although you said you did not include it? Do not include it—make any allowance for it.

[fol. 386] F. C. Hamilton testified:

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[fol. 387] Q. What is your business?

A. I am employed by Henry L. Doherty & Company as a consulting engineer and am also a member of the Executive Committee of Henry L. Doherty & Company which operates all of the property of the Cities Service Company.

Q. Will you please specify somehow to us to get it to us fairly, the amount of your experience in the matter of the valuation of various kinds of properties and your knowledge of it, that is valuations made not only for rate cases, but for the commercial world, generally; and for purchase and sale and so forth.

Mr. Enyeart: We will waive that.

Mr. Mullin: I want it on the record.

The Witness: Beginning back in 1906, from 1906 to 1910, I was with the Western Electric Company at the time when they were manufacturing not only telephone apparatus as they reported, but also power equipment, and I had charge of the cost department. From 1912—early in 1912—until about April of 1914, I was with Arthur Young [fol. 388] and Company, accountants, making investiga-

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tions of operating expenses for public utility companies with an idea of establishing rates; and from 1914 to '17 was with Harold Almert, Consulting Engineer in Chicago, during which time my work was being devoted to valuations of public utilities for the purpose of purchase or sale or for the purpose of informing bond houses on the values back of a prospective issue of securities, or for the purpose of presenting a rate case.

From April, 1917, to date, I have been with Henry L. Doherty and Company; my work for the first five or six years was wholly devoted to valuations of properties that were under consideration for purchase or of properties that were involved in rate proceedings.

Four years ago, I was put on the Executive Committee and in addition to my duties of handling rate cases, valuations for tax matters, for purchase, I was empowered to act for the company on the question of purchase and sale of any properties, and have handled all of those negotiations from that time to this.

Q. Mr. Hamilton, what is the approximate amount or value of the properties under the control of the Executive Committee of which you are a member?

A. About 1,250 million dollars.

Q. That is a billion two hundred fifty million dollars?

A. Yes, sir.

Q. Are you acquainted with the cost of the organization of a company, either utility or non-utility, prior to the time when construction costs begin; that is, sometimes called organization costs and sometimes pre-construction costs?

A. Yes, sir, I am reasonably familiar with that cost. We have to go through that procedure from time to time in

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[fol. 389] the organization of our own companies, of various kinds, to take up any new project or any project in a new location.

Q. Mr. Hamilton, just for the purpose of directing your testimony generally, there seems to be an impression sometimes that valuations such as we have here are made merely for rate cases, and I would like to have you in your testimony set forth the facts as to such valuations for rate purposes and outside rate purposes so that the Commission will get your view, whatever it may be, and also in your testimony, I would like to have you state the general usages and customs of the business and you may illustrate by your own experience and explain your association also. Will you please detail what these pre-construction costs are in the organization say of a natural gas company?

A. Well, at the particular time we are getting ready to build a pipe line to Chicago. The investigation of the markets in that particular——

Q. From where do you start?

A. Amarillo.

Q. Texas?

A. From Amarillo, Texas, to Chicago. I have in my own department spent a little over $178,000.00 on the investigations of the markets. That has been spent over the last two years.

The acreage that is to back up that pipe line was acquired beginning a little over three and a half years ago.

Q. What do you mean by acreage?

A. The acreage from which we expect to get the gas and which, of course, had to be acquired, and we had to have an assurance of it before anybody would lend us any money to build the pipe line.

The legal expenses have been involved because in that,

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[fol. 390] we will have about four partners before we get through with this; traveling expenses to an amount of a good many thousands of dollars have been involved. We have already spent nearly thirty-five thousand dollars and the various pipe companies have spent a lot more—which, of course, they have to bear and do not charge to us—on the question of the pipe that is going to be used in this line.

It has been now concluded that under the combined work a pipe has been developed that has about twice the strength of any that has been used up to date, and that therefore, we can use for a given quantity of carrying capacity, the smaller pipe, and that will save us investment on that. There have been innumerable conferences, discussions, with the resulting traveling expenses and expenditure of time, all prior to the fact that we have not yet organized the company and I don't know what its name is going to be; and we have not yet ordered the pipe; we have not yet made the final contract with the Insull Interest in Chicago to sell gas either directly to them or buy ours. That happens to be the situation there. I presume the total expenditures to date that are prior to organization and outside of the engineering, have totalled at least 650 to 700 thousand dollars.

Q. You say that is outside of engineering?

A. That is outside of the engineering. The engineering investigation was a special situation having to do with the

pipe. When we come to organize the company, there will be further legal expenses that have to do with the organization and the issuance of the necessary stock and the participation of the various partnerships that are still to come.

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[fol. 391] Q. Let me ask you a question right there: Are any of these pre-construction costs that you speak of reflected in the overheads which are included for valuation?

A. No.

Q. Some of the same elements enter, for instance, legal expense?

A. Legal expenses will begin over during construction, but they will be entirely separate and different and have to do with different cases and quite often in a project such as we have to do with, different individuals——

Mr. Klapp: If the Commission please, yesterday Mr. Tatem made an objection to the same line of testimony—wasting time of the Commission and everyone else. He is testifying as to the cost of a pipe line from Amarillo, Texas, to Chicago—some particular pipe line. He should confine his testimony to the cost of this particular matter before the court or some general opinion, probably.

Chairman Geiger: What is the purpose of this testimony about Amarillo-Chicago pipe line? We all agree that there are certain preliminary services to be performed; it is a question of law as to how it should be capitalized is all, and I don't quite grasp what Amarillo-Chicago pipe line has got to do with Tippecanoe City, Sidney, Piqua.

Mr. Mullin: I assume it is in reference to the suggestion that he illustrate his testimony.

Chairman Geiger: Well, it is too different.

Q. Now, we will get to this question. Are similar expenditures necessary in the organization and construction of any gas plant, Mr. Hamilton?

A. Of course, you have to go through the preliminary motions; you have to get your company incorporated; you have to get your charter; you have to make your agree-

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[fol. 392] ments; you have to have your negotiations that are all prior to beginning any construction.

Q. Mr. Hamilton, are you acquainted with the Dayton Power & Light Company and a number of plants that are

involved in this proceeding now before the Commission?

A. I am in a general way, having been acquainted with them more or less for the last five or six years.

Q. Assuming then that it was necessary that you were to engage in the reconstruction of a plant for the purpose of supplying the places involved in this proceeding, would preconstruction costs of the kind that you have paid, be necessary?

A. Yes, there probably would be; but the engineering expense would be directed in an entirely different way; you would have to have a preliminary engineering set-up so as to know the approximate cost of your project before you begin; there would be no use of forming your company because you would have to have reached at least a tentative agreement for your money.

Q. Are any part of the costs, pre-construction costs or organization costs that you have been discussing deflected or involved in the allowance for going concern value?

A. No, sir, they are not.

Q. Do the consumers of the gas company which would be so organized and the plant constructed, get the benefit in any way of the service such as you are describing?

A. Yes, it is a part of the cost of the construction of the plant, of the completed plant.

Q. Would the plant be constructed, and would there be any service if these pre-construction activities were not carried out?

A. No, of course not.

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[fol. 393] Q. Do the expenditures which you have in mind contain any element of profit of promoters or owners or anything of that kind?

A. No, sir.

Q. Just costs?

A. They are costs.

Chairman Geiger: Are these the ones that are generally designated as organization costs?

The Witness: Yes, sir.

Chairman Geiger: That is the heading you have on Page 9.

Mr. Mullin: Yes, the witness also used the term "pre-construction" and I have used both terms.

Chairman Geiger: I was trying to identify your record.
Mr. Mullin: Yes, that is it.

Q. Are you acquainted with the allowance made in this case for organization costs or pre-construction costs, $24,000.00, Mr. Hamilton?

A. Yes, sir.

Q. What is your judgment as to the amount of that or what is your judgment as to what the amount of such cost should be in the reconstruction of the plants involved in this case?

A. I think it is a reasonable amount—not excessive at all.

Q. In your judgment, would such costs be at least that amount necessarily being paid in the construction of the plant?

A. My judgment is that probably, if we were attempting to reconstruct it, you would spend more than the amount of money before you got through.

Q. Necessarily more, you mean?

A. Yes, sir.

Q. After the plant has been constructed and the valuation is being made, state whether or not these costs are

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[fol. 394] taken into construction by persons fixing value in commercial transactions generally, wholly disregarding utility cost?

A. Why, yes, if I were going to buy a plant and it was already organized and ready to do business, those costs would be behind me and I would have to include them in the purchase price unless I had the seller at a disadvantage.

Q. In fixing the values of such property, do you make any distinction at all in a rate case valuation and a valuation of a non-utility property?

A. No; Ford, Bacon & Davis have made these same valuations for me, and when I was considering the purchase of property.

Q. Are you familiar with the items of the elements set up in the valuation in this case?

A. Yes, sir, I am familiar with them as to the items that have been included here and the approximate amount of the so-called intangibles and overheads.

Q. Are those items all included in the valuations of properties?

A. Yes.

Q. Utilities and non-utilities in commercial transactions generally outside of utility cases?

A. Yes; of course, there is always a further item given consideration and that is earning capacity.

Q. In a non-utility case?

A. Yes, it is given consideration when you are purchasing and selling the utility. In other words, I do not suppoes there has any electric property been transferred in the past three or four years that was not transferred at anywhere from twenty-five to fifty per cent. more than this type of valuation would disclose as its value. That is reflected best by the valuation of the common stocks in the

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[fol. 395] market; that can easily be figured out on almost any utility that is in the market.

Commissioner Bricker: You don't mean electric railroad.

The Witness: No, sir, very decidedly not; those have been sold probably for their reproduction cost.

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[fol. 396] Cross-examination.

By Mr. Keyt:

Q. Coming back to organization costs that you have when you possibly bought a plant and you had an appraisal made and various items in this appraisal were set up——

A. Yes, because that is one of the jobs I have with Doherty & Company is the acquisition of property.

Q. Then you have Ford, Bacon & Davis probably make this appraisement and set up this organization or costs separately?

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[fol. 397] A. We have done that in a few cases. Usually my own men do it. In other words, I have a valuation department similar to that of Ford, Bacon & Davis and if I can use my own men, if they are not busy somewhere else, I won't pay Ford, Bacon & Davis the profit they would make for making the valuation for me.

Q. They set up this organization cost then?

A. Yes.

Q. What company was that you have in mind?

A. Oh, there have been so many; when I bought Wichita and Hutchinson and Newton and Pittsburgh, Kansas, from the Electric Bond & Share Company; when I attempted in the last three weeks to buy the Warner-Quinlan Company.

Q. Do you recall what the percentage of value in appraisement was that was set up for organization costs in that case?

A. In the Warner-Quinlan Company in our valuation which we made of this and which was finished just before I came out here, we allowed them three per cent.

Q. Three?

A. In the Electric Bond & Share set-up, I think we only allowed them about one one-half percent., because we were not buying the company of them. In all of those towns, they had the electricity and the gas company and we were buying the gas property and we gave them credit for only that amount of pre-organization work such as franchises for the gas department and that sort of thing; that is, they had no company set-up; we had to go and charter our own company and go through the performance, but had we bought their company as a whole, that would have been done for us.

Q. Well, aren't those same costs included in this four per cent. here?

A. In the four per cent. for financing?

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[fol. 398] Q. Then their average cost of that would run about one one-half or maybe three per cent. to sell the security?

A. Oh, no, you could not sell the securities for that. You are talking about pre-organization expense that had to do with getting the charter of the company, getting the permits to do business— In this, making your contracts with the people who are going to supply you the money, drawing up your agreements in that type, getting a tentative agreement with the City Council as to the rate that you can charge—something that you have got to know before you can raise money on the project, and things of that kind.

Q. Well, as representing the purchaser, have you ever paid as high as that?

A. Why, yes, many times.

Q. What was the lowest you ever paid?

A. Oh, I don't know as I could recall that, because I have bought a good many billion dollars worth of property.

Q. Well, was it lower than four per cent.?

A. For finance cost?

Q. Yes.

A. No, I never paid as low as that. Don't get the four per cent. confused with pre-organization expense. They are two different and entirely different things and they come in different directions. The pre-organization expense

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[fol. 399] will be spent by the company itself and reimbursed from funds of their own and other finances, whereas the four per cent. is spent by the company, but is finally paid out to individuals by the bond house or brokerage house in payment to their salesmen of commissions and salaries for the selling of the securities—something entirely different.

[fol. 400] JAMES A. EMERY testified:

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[fol. 401] Q. James A. Emery, did you say?

A. James A.

Q. Mr. Emery, where do you reside?

A. In Montclair, New Jersey, a suburb of New York City.

Q. Where is your place of business?

A. Number 39 Broadway, New York City; I am a Director and Vice President of Ford, Bacon & Davis, Incorporated.

Q. How long have you been connected with Ford, Bacon & Davis, Incorporated?

A. With the corporation and its predecessor before for thirty-two years.

Q. Will you please state, Mr. Emery, for the record what your experience has been in connection with the financing of enterprises whether public utilities or other kinds, and generally in regard to the valuation of such utilities, or such utilities whether gas utilities or not?

A. For the past 20 years, I have been engaged very largely on valuation matters, dealing particularly with such items as overhead costs and intangible items of value. In the operations of our concern, I have had more or less knowledge of financing, but I have never had any direct connection myself with the sale or issuance of securities.

Q. What is the extent of the financing with which you

have become familiar in your connection with Ford, Bacon & Davis as you have just stated, approximately ?

A. Well, I have had occasion to investigate such costs

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[fol. 402] with respect to all valuations that I have been connected with and I should say in total they run to at least one billion dollars, perhaps two.

Q. In your experience as you are stating it what attention, if any have you given to the intangible values of utilities and other corporations?

A. I have had occasion to make some very extended studies of intangible elements of value in particular and principally for the Pennsylvania Power & Light Company operating all of the electric light system and a large part of other public utilities in Northeastern Pennsylvania; the Consolidated Gas Electric Light & Power Company of Baltimore; the Pittsburgh Railroads, Duquesne Light Company, the Public Service Railway of New Jersey, the Logan Gas Company, the Oklahoma Natural Gas Company, the Central Hudson Gas & Electric Company.

Q. The Duquesne Company operates in the vicinity of Pittsburgh?

A. In Pittsburgh and vicinity.

Q. Have you had any connection with the valuation of any portion of the property of the Dayton Power & Light Company that is involved in these proceedings here, Mr. Emery?

A. I have directed the valuation of the intangible elements of value.

Q. Without detailed questioning, Mr. Emery, so as to save time, will you take up the item of organization that is allowed in the valuation here as it appears on Page 14 of the report?

A. I would like to state at the outset, that I do not consider this item as an item of intangible value. I believe it attaches to the physical property and as a part of the value of the physical property.

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[fol. 403] Q. Go ahead.

A. As to the organization or pre-construction expense as we stated and calculate, they cover all of the necessary expenditures before the construction of a property can be begun.

Q. Mr. Emery, may I interrupt you right there. In this testimony that you are giving, I would like to have it made clear whether or not that is a procedure followed simply for rate-cases valuation or is it for valuations generally in the commercial world?

A. Oh, for all kinds of valuations, it is an essential part of the production of the property.

Q. Is it limited to utilities or does it apply also to other properties as well?

A. It applies to other properties although in the case of a manufacturing plant, not to the same extent.

Q. Go ahead.

A. It covers particularly the development of the preliminary organization necessary to develop or promote the idea and bring it up to a point where construction can be begun. That involves interesting people with sufficient influence and money which they are willing to put up to carry the project to that point; after such a group of people has been interested, they must proceed to get the necessary rights, which include charters—franchises—and then they must interest people who have the ability to supply or guarantee the necessary amount of capital. These proceedings are not by any means cut and dried. In the first place, men of standing can not be expected to go into a thing of the sort unless they are reasonably sure that it will prove successful, and to determine whether it will be successful or not, it is not sufficient to take the word or judgment of somebody, but there must be a careful determination of

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[fol. 404] the amount of available business, and that not only involves a study of the population and its characteristics, but of the industrial use that may be made of gas. The industrial use of gas has a very much better load factor than the domestic use, and is essentially a backlog of a natural gas plant. It is one of the most important items to be taken into consideration.

Based on such a survey, a determination must be made of rates, preliminary determination of rates that an agreement can be obtained to, the supply of gas must be looked into; that is, it must be determined as to where it can be obtained, and particularly in the case of natural gas, how long the supply is good for, because no one wants to invest a million and a quarter dollars without knowing how long

it will be before they have to turn to some other method of securing a gas supply which may involve a new contract or may involve the construction of an extensive manufacturing plant.

These studies are generally made by engineers. In the meantime, the services of lawyers have to be called upon to determine the necessary legal steps that have to be taken in connection with organization and securing the rights. The securing of the rights is generally not a simple affair, even in cases where natural gas is fairly well known. The gas must always in the case of a new plant, to a considerable extent, displace other fuels, so that the cost of the use of other fuels has to be figured carefully in comparison with the cost of the use of gas, and a very active opposition can always be expected, on the part of the supply dealers of the other kinds of fuel.

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[fol. 405] After the necessary rights have been obtained, the project is ready for the bankers. An amount of money of this kind for this purpose can only be raised in a very few of the financial centers of the country and in those centers a comparatively small proportion of the banking houses deal in natural gas, so that the field for sale of the securities is not a very broadly competitive one.

Commissioner Bricker: Would not have to spend very much time looking around.

The Witness: They usually have to spend plenty of time looking around.

Chairman Geiger: I thought you could go right to the door and ring the bell and find the bankers dealing with natural gas—very few of them?

The Witness: Very few of them.

Chairman Geiger: You know where they are?

The Witness: They are pretty well known, yes.

Chairman Geiger: Oh, allright.

The Witness: Now, the bankers require something more than preliminary estimates for their purpose. They expect to go out and distribute the securities widely and their reputation and standing as a house depends upon the soundness of the enterprise that they go into, so that they have to make on their own account a very careful determination of the earnings; they have to investigate and have to be shown that all the legal conditions are satisfactory.

We have studied records of various details entering into this procedure in a great many cases and at great length, and have made many detailed estimates of the cost of such pre-construction work.

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[fol. 406] The estimate included in this report is based on such studies as we, in cases where we have made detailed estimates, usually refer the estimate to the estimated cost of the property and obtain a percentage which we use in other cases where the conditions appear to us similar. So that I feel that the allowance in this report of two one-half per cent. of the cost of reproduction new is a conservative allowance for this purpose.

Q. In your judgment, would such expense to the amount—

Chairman Geiger: Just wait a moment, where does that two and a half per cent. go; does that two and a half per cent. *go; does that two and a half per cent.* go direct back to you for having made the preliminary examination and so forth?

The Witness: We have made preliminary examinations of that sort with their engineers and lawyers and original promoters, if we will call them that.

Chairman Geiger: Well, that is your first item on Page —

Mr. Mullin: 14.

Chairman Geiger: No, not on 14.

Mr. Mullin: Page 9.

Chairman Geiger: Isn't it on Page 9 of the per cent. column?

Mr. Mullin: Yes, sir, Page 9.

Chairman Geiger: Then this organization costs two and one-half. All right, we have it. But now, as I read this, you have in your organization costs a lot of legal expenses and that is in this Page 9 carried over to law expenditures during construction, insurance during construction.

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[fol. 407] Mr. Mullin: This is pre-construction, Mr. Commissioner.

Chairman Geiger: Oh, I see, we have to pay the lawyers before we do anything at all.

Mr. Mullin: We will prove by the witness what our theory is in that connection.

Q. Mr. Emery, what is the fact as to such costs being necessary costs of the organization of such a company for the construction of such a plant or plants as are involved in this proceeding before the Commission?

A. No, no plants can be built without such expenses or similar expenses.

Q. In your experience, do you know of the payment of such expenses?

A. Oh, yes.

Q. Is this an estimate made for the purpose of a rate case by you or is it a calculation to the best of your judgment of what the expenses of that character would actually and necessarily be in the organization of a company of this size in the place where these plants are?

A. It is an estimate of what such expenses would be for the reconstruction of a plant of this kind.

Q. In your judgment, could it be done without incurring such expenses to the amount specified here?

A. It could not.

Chairman Geiger: Now, let me ask you just a question there, modifying that. You put a flat rate of two and one-half per cent. on there irrespective of the amount of the transaction. This one is substantially a million dollars. That would produce $25,000.00. Would you put the same two one-half per cent. on if it were ten million—one hundred million?

The Witness: If it were a larger property and if the character of the property differed, the percentage might

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[fol. 408] vary. I might say in that case that the detailed calculations that we made of such estimates run from two per cent. in some cases to five or six in others.

Chairman Geiger: But you think two one-half per cent. is all right for a million dollar proposition?

The Witness: Yes, sir.

Chairman Geiger: That would produce on that $25,000.00 for this preliminary work?

The Witness: Yes, sir.

Chairman Geiger: Is that right?

The Witness: Yes, sir.

Chairman Geiger: All right.

Commissioner Bricker: Have you taken into consideration in estimating the amount of $25,000.00, the fact that

the reconstruction of the plants now under consideration would be carried on by the established organization which has possibly 20 or 25 million dollars worth of property and this is merely an addition to that established going concern, the Dayton Power & Light Company?

The Witness: I believe that if a concern of that kind should undertake such an enterprise, the expense would probably be as much as estimated here.

Chairman Geiger: If the company would start then from a standing start, it would have just about the same expense for preliminary work as if the company were already established and doing business in another territory contiguous to where the extension is made.

The Witness: I think it would have about the same; the offices of the Dayton Power & Light Company would have

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[fol. 409] to do a lot of real work in getting this in motion and the equivalent—they would have to perform the equivalent of the work that we ordinarily estimate to be done by the promoters.

Chairman Geiger: You have not given any credit for the fact that they had their banking connections established and their credit is already fixed and that money would possibly be more available to an established concern of the worth of the Dayton Power & Light Company than one which was starting out new without any past history.

The Witness: No, I would not assume that those conditions are ready at hand.

Chairman Geiger: You have assumed that this property would be reconstructed today as a unit, rather than as a part of the Dayton Power & Light property?

The Witness: I think the actual method of a preliminary organization would be independent of the Dayton Power & Light Company.

Chairman Geiger: And that is the method that you have pursued in this set-up?

The Witness: That is the method we ordinarily pursue in arriving at estimates.

Chairman Geiger: I don't care what you ordinarily do—I know that is true—but what have you done in this case?

The Witness: Well, I think what I——

Chairman Geiger: I would like you to answer the question.

The Witness: In this case, we have used a percentage which is based upon the results, the detailed estimates that we made in other cases where we have estimated upon the independent construction of such plant.

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[fol. 410] Chairman Geiger: You have given no consideration then in this case to the fact that this is a part of a large operating concern?

The Witness: I believe that the cost to a concern of this kind would be substantially as great as this estimate includes.

Chairman Geiger: Will you please answer my question without any further avoidance, if you can, and if you can not, say no.

The Witness: May I have the question?

Chairman Geiger: In this set-up, you have approached it the same as if the property which is under consideration were constructed as a single unit without regard to the Dayton Power & Light Company, owning and operating other properties.

The Witness: (No response.)

Chairman Geiger: Will you read the question?

(Previous question read.)

The Witness: Yes, sir.

Chairman Geiger: All right.

Q. In your judgment, would there have been any difference between your estimate as you have made it and what it would have been if you had considered it as never connected with the Dayton Light & Power Company and made as a part of its total plant?

A. I think the cost would have been substantially the same. That is the same care in preliminary consideration would have been gone into.

Q. And the expenses would have been the same?

A. Yes.

[fol. 411] (2) Cost of Financing

[fol. 412] F. H. Lerch, Jr., testified.

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[fol. 413] Q. Mr. Lerch, on Page 9, I think you had gotten down to finances?

A. Yes, I had described the other overheads.

Q. Well, start there and proceed?

A. The cost of financing has been set at four per cent, of the distribution system and the general property. The cost of financing as included here is designed to cover the out-of-pocket expense of the company in assembling the funds necessary to carry on the construction.

Chairman Geiger: Assembling what?

The Witness: The funds, the cash money.

Chairman Geiger: On what page is that?

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[fol. 414] The Witness: Page 9.

Chairman Geiger: You have not got that on—Page 9?

The Witness: Page 9 of the report.

Chairman Geiger: But you have no figure on the matter.

The Witness: Well, I have got the percentage on Page 9 and the figures appear on Page 14. This is a known item and is not in any sense intended to include bond discount as it is commonly called, or as bond discount is commonly considered. This represents the cost of floating the securities, of selling the bonds or whatever securities are used in this.

Q. Let us see if we understand that, Mr. Lerch: That means the cost that the company has to pay no matter whether the securities are sold at par or at a discount, is that correct?

A. That is correct, yes, sir.

Now, the next item that we have considered is working capital——

Q. Just a moment, on these items of general overheads that you have specified, could such a plant be constructed without incurring those charges?

A. No, sir.

Chairman Geiger: How do you know?

The Witness: Because we have paid money for that, for building these plants.

Chairman Geiger: I know you have paid money for building a small plant, but have you ever been in an operation where you built as many as the number of plants you have here all at one time?

The Witness: No, but I have been in operations where we have spent many millions of dollars more than this—

many millions more. For instance, our own—the plant
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[fol. 415] that I am the manager of myself costs about sixteen million dollars as it stands at the present time.

Chairman Geiger: Costs what?

The Witness: About sixteen million dollars for plant investment as it stands at the present time. We incurred all of these expenses in building that plant.

Chairman Geiger: All right.

Q. What are the actual facts of construction which necessitate such expenditures?

A. Well, the actual facts are that you have to get your money together——

Q. I mean the entire amount——

A. That is what I am talking about; you have to get your money together and you have to supervise the expenditure of it and you have to record the expenditure of it, and you have to pay for the use of it until it begins to earn something for you and that is what these expenses are designed to cover.

Q. Are each of those items actual construction costs of the physical property?

A. Yes, sir, I think they are.

Chairman Geiger: By whom is the stock of this company held; by what other company?

The Witness: The Dayton Power & Light?

Chairman Geiger: Yes.

The Witness: Well, any answer I should make to that would simply be hearsay. I just understand it is owned by the Columbia System.

Chairman Geiger: The what?

The Witness: The Columbia System.

Chairman Geiger: That is right.

The Witness: I am not giving that as a fact of my per-
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[fol. 416] sonal knowledge.

Chairman Geiger: Well, if they would first construct anything, they would get their money from the parent corporation?

The Witness: They very likely would borrow the money from their parent corporation.

Chairman Geiger: And they would not pay any interest during the time they were not using it?

The Witness: Well, that is rather difficult to say. Somebody has to incur this expense. Now, if the parent company chooses to incur them and donate them, that is another matter that does not detract from the fact that these are expenses.

Chairman Geiger: I see. You mean that they have to be incurred and if the parent company incurs them and does not get reimbursed, that is their loss.

The Witness: That is their lookout in it.

Chairman Geiger: Sure.

Q. Could such a plant be constructed without incurring such charges to at least the amounts you have specified?

A. I think not.

Q. And then they are reasonable, you say?

A. I think they are reasonable, yes, sir.

Q. What is the fact as to such allowances being always made according to the general usages and customs of the engineering business or profession in making estimates of construction costs of such properties?

A. I have never seen a propostion set up for financing without including these or a proposition being considered that does not include these expenses.

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[fol. 417] Q. Then your answer is in substance that they are always allowed according to general usages and customs?

A. Yes, sir.

Chairman Geiger: Well, now, do you mean that the engineers who are accustomed to testifying before Commissions have designed and fixed a plan by which they give the estimate of the cost or do you mean that some contracting company or some company which wishes the work to be done for it have adopted this plan?

The Witness: No——

Chairman Geiger: In other words, this is a plan for the witness or for a plan of construction?

The Witness: This is not a plan in the sense of a plan—this is just a statement of what actually occurs in this kind of work out in the business.

Chairman Geiger: How much is this kind of work ever done by you?

The Witness: Yes, sir, we do this kind of work all the time.

Chairman Geiger: All right, all right. Go into a city as large as Lima or Washington Court House and lay new pipe in there?

The Witness: Yes, sir, we have done that and we have gone into much larger towns. We have had more to do with the financing and the engineering and the construction of the Southern Natural Gas Corporation, for instance, which is at the present time about a 20 or 25 million dollar investment and is to be a thirty-five or forty million before it is a complete job, and all of these matters, exactly as I have set them up here have been taken into account in consider-

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[fol. 418] ing every item of that investment before it would be recommended.

Q. Mr. Lerch, I don't think you answered directly one question that was asked you, and I think it may properly be done. You were asked if this up is one that is prepared for rate cases substantially or if it is what actually occurs in the real construction of a plant such as this?

A. That is what I thought I answered when I said this was not a plan for rate purposes. This is simply a set-up of the actual facts as nearly as we can portray them in the report.

Q. Would all of these costs be incurred in the construction of the physical plant only, whether the plant ever was operated or not?

A. Yes, sir.

Q. Are any of them duplicated in the direct allowances which you made or allowances you made for direct overheads?

A. No, sir, they are not.

Q. Do they contain any element of going concern value or any item that is considered in determining going concern value?

A. They do not. They are based entirely upon actual out-of-pocket expenditures regardless of whether the plant ever becomes a going concern.

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[fol. 419] Commissioner Bricker: You have allowed seven per cent. for the cost of the money or interest on the money, the complete construction cost for a year's period?

The Witness: Yes, sir.

Commissioner Bricker: And in addition to that, you have allowed four per cent. for cost of financing?

The Witness: In addition, but not cumulative.

Commissioner Bricker: Your four per cent. is figured on the actual reconstruction cost?

The Witness: That is right, but the same figure that the seven per cent. is allowed on.

Commissioner Bricker: That the seven per cent. is allowed. Yes, I see that. Now, that four per cent., cost of financing is I believe the cost as you explain, in gathering together the capital and in instituting this project?

The Witness: No, that is the cost of getting together the money, the cash for the use in constructing the project.

Commissioner Bricker: If I misuse the word "capital", I meant cash.

The Witness: We have in the report the allowance for the amount of organization expense which perhaps you have in mind when you said instituting this project.

Commissioner Bricker: Oh, I mean the cost there to go

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[fol. 420] out and gather in this money.

The Witness: That is right.

Commissioner Bricker: Secure this capital through the sale of stock, through the sale of bonds or other securities?

The Witness: That is right.

Commissioner Bricker: Covering construction cost?

The Witness: That is right.

Commissioner Bricker: Is there any distinction in your mind between such cost and the discount on the sale of securities if they had all been sold, for instance to a bank?

The Witness: Yes, there is a very decided difference.

Commissioner Bricker: What is that difference?

The Witness: Well, they are different fundamentally. This four per cent. is designed to cover an out-of-pocket expense, that is an expense with the company; it is a deduction from the monies the company gets regardless of the

rate and which its securities might be issued on the market—that is the interest rate fixed upon its securities. The discount is, of course, fundamentally increased or decreased or established in order to make the security at a lower rate of interest, of value to the investor, but it has nothing to do with this actual out-of-pocket expense.

Commissioner Bricker: Does not the payment of your seven per cent. interest presume that you are borrowing this money from a financial institution without discount?

The Witness: Yes, at the present time, the money would be secured through—the securities would probably be sold to the investing public at par.

Commissioner Bricker: I can see distinction between the

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[fol. 421] four per cent. which you claim here as a cost of financing and the actual cost of selling securities at a discount. It is the same in each instance, the cost of getting money and it is out-of-pocket just as much if it were discount——

The Witness: The discount is not the cost of getting money; it is the cost of getting money at a certain rate, is the way I see it. For instance, if these bonds were seven per cent. bonds and were sold to the investing public at par, at $100.00, the company would not get $100.00 in money to spend in its construction; it would get $100.00 less whatever had to be paid for the assembly of the money, the assembly of the cash.

Commissioner Bricker: And it has not been allowed by the courts as a proper charge to the rate base?

Mr. Mullin: Yes.

The Witness: It has been allowed in some instances.

Commissioner Bricker: In most instances not—possibly you haven't those cases in mind.

The Witness: I haven't those cases in mind.

Mr. Mullin: The Supreme Court reversed itself, however, it has limited it in the first place and also in the second, in the Ohio Valley Water Company case in that court.

Commissioner Bricker: I don't think that is the general rule, and it has not been the rule in this state as I understand it. I may be wrong about that.

The Witness: Well, if I have made myself clear as to what I regard the distinction——

Commissioner Bricker: You have made yourself clear, but you have not shown me the distinction between the two.

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[fol. 422] The Witness: Well, that, of course, I will have to leave for further argument.

Chairman Geiger: Maybe you can succeed in doing it to him by my asking a question: This four per cent. is four per cent. on the total amount of your construction?

The Witness: No.

Chairman Geiger: Depreciated or original?

The Witness: It is four per cent. on the reproduction of the physical property new.

Chairman Geiger: Without taking out his four per cent. upon the depreciated, reconstructed?

The Witness: That is right, it is computed on the new basis.

By Mr. Tatem:

Q. This item, Mr. Lerch, shown on Page 14 amounts in money to $39,600.00, does it not?

A. Yes, sir.

Q. The cost of financing?

A. Yes, sir.

Q. Is it a necessary presumption that the person who is doing the piece of work does not have the finances to do it with, and would you say that our contractor, who should be Mr. Mullin, is building up his bids should say, "It is going to cost me so much to do this; I will include a charge of four per cent. for getting the money", even though he has money as part of his working capital?

A. He tries to get that into his bid on the job.

Q. Henry Ford, building the D. T. & I. would have to charge four per cent. for spending the money?

A. He should, otherwise, he is just spending money which he is entitled to a return on just the same way.

Q. Why would he be cheating himself?

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[fol. 423] A. Well, he would be putting out his own effort and his own money without——

Q. Is that worth four per cent. above the regular rate of interest?

A. I think it is; he certainly is entitled to something for the use of his money.

Q. Henry Ford is the one who complained of usury in New York?

A. Well, I can not help that.

Q. If I am building a house, would I naturally charge to my expense the item of securing money if I am already in possession of funds to build the house with?

A. I don't think the situation is quite analogous.

Q. Well, what if the company goes out and raises the money by selling common stock among its friends, as it could do under the laws of Ohio, and pays no commission?

A. But it is not the condition.

Q. But in putting——

A. There certainly is some expense to whoever *goes out* and sells it to his friends.

Q. Necessarily?

A. Absolutely his time is worth something; he must have some expenses; his friends don't know what he is doing until he goes to the trouble of selling them this stock in order to get the cash in the bank to pay his bills with.

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[fol. 424] Chairman Geiger: May I ask this question to get it straightened out? Mr. Lerch, on page 14, you have figured $39,600.00 as cost of financing?

The Witness: Yes, sir.

Chairman Geiger: That is four per cent. of what figure above it? It is not four per cent. of $959,636.00; what would you include in that to determine your four per cent.—the subheading, distribution property and total property, total general property, *total general property*?

The Witness: That is four per cent. of the $959,636.00 plus the $51,314.00; those two items representing the physical property.

Chairman Geiger: Four per cent.?

The Witness: Yes, sir.

Chairman Geiger: If four per cent. be the proper amount for financing, on just what theory as you have it that it should be four per cent. on the new value of the property? This is what we are trying to find out: Why wouldn't it be four per cent. on the depreciated value of the property? You don't depreciate—when you depreciate, you don't depreciate these overheads.

The Witness: This is an investigation to determine first, the cost new of the property, and what it would cost to

build that property, and the cost of financing is the cost of

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[fol. 425] gathering the money together to build the new property. Now, the actual value of the property is generally considered at the deteriorated basis of the physical property; that does not affect the cost of financing, and because the physical property is deteriorated, to rebuild the plant would cost just as much on a new basis.

Chairman Geiger: Well, then, we could easily concede this: That you may take a plant that is so run down that it is not worth ten per cent. of its value—it is only in ten per cent condition—we will concede that; then you theoretically reconstruct it new and add four per cent. of that reconstruction value and then depreciate it this 90 per cent.—not four per cent. of its depreciated value, but four per cent. of its construction value, and by the time you get done with that figure, you would be able to make your old plant that was not worth anything, worth a very considerable sum of money by that simple device of adding four per cent. to its reproduction value.

The Witness: In the condition that you cite, I think you would arrive at that absurd conclusion, yes, sir.

Chairman Geiger: You might take a water plant that was washed out, blown up, and everything else happened to it and by taking an item—when it was not worth ten per cent. on its original account—and then reconstruct it at a tremendous amount, and then add four per cent. to that and then depreciate the reconstruction cost but not decrease that four per cent.; why don't you take your four per cent. of that depreciated amount?

The Witness: Because the expenditure of that money

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[fol. 426] when we come to reproduce the plant does not decrease by any deterioration. That is an expenditure that has been made.

[fol. 427] F. C. Hamilton testified:

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[fol. 428] Q. Mr. Hamilton, you are acquainted of course with the cost of financing such enterprises?

A. Yes, sir.

Q. Will you tell what you mean by that, just what has to be done, keeping in mind plants such as the one before this Commission; explain what in your judgment would be the amount of the necessary cost of financing for the construction of these plants?

A. What has to be done is, after a contract guaranteeing you the money has been secured, you have to pay some bond house or you have to expend yourself—we do it ourselves very largely; sometimes employing bond houses—but the cost is very little different because we are no smarter than the bond house; we have to pay salesmen to sell the securities; that is, the out-of-pocket cost; that has nothing to do with profit and covers the distribution of whatever type of securities you use as a method for raising that money and ordinarily you have to raise it from—just by and large—from three different sources: Bonds for a percentage of it; preferred stock for another and your equity money from somewhere else.

Q. Natural gas cases, or considering natural gas securities, how general is the market?

A. The market is more general now than it was. Within the last five years, practically nearly all of the securities that are now outstanding on natural gas properties other than common stock, have been put out. I don't believe that there are any bond issues outstanding on natural gas properties that are back of 1923. Prior to that time, you could not sell bonds on a natural gas property because

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[fol. 429] every one of them with which I am familiar had wound up in the receiver's hands, and with the result that nobody wanted to handle them. Most of the financing was done through common stock and was limited very largely to two points, and that was Cleveland and Pittsburgh, because they were close enough to the original oil and gas discoveries to have been familiar with that speculative type of investment. Back in 1924, after a tremendous amount of work, we got one of the New York houses of reputation and of standing to take a bond issue on a natural gas property, and with fear and trembling they came out and said point blank they were selling bonds on a natural gas property. Since that time, there have been a large number of issues. The cost of financing is hard for anybody who is not in that particular deal to determine for

the simple reason that almost all of these bond issues that have been put out fall in one of two classes: Either they are a straight bond issue backed by the credit of a parent company where the cost would be comparatively low, or else they are a bond issue that have attached to them stock warrants which make it hard for you to compute what the company really paid because included in the stock warrant is a preferential right to buy stock at some future time which will be exercise- only when and if it becomes to the disadvantage of the company and to the advantage of the owner of the stock warrant. With all the bond issues that are outstanding at the present time, most of them have cost initially from five to fifteen points to sell. By that, I have no reference now to the interest rate which they carried, nor to the discount at which they were sold; I am talking about the spread between the amount of money the

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[fol. 430] company got and the amount at which the securities were sold to the public.

Q. What do you mean by points, so many points?

A. On bonds, your hundred dollar bond—and many of these carry hundred dollar divisions—would be sold to the public, for instance, at 89.

Q. That would be 11 points off?

A. No, that is the discount.

Q. Yes.

A. But if it was sold to the public at 89, the company got something less than that, the difference representing the cost and profit to the bond house for handling it. I have before me here a twelve and a half million dollar issue that carried stock warrants on it. The price at which the bankers got it was 89½ and the price at which it was sold to the public was 99½ and the price in the market as of March 14, you might be interested to note, $78.00. There was not a parent company backing that credit. Those two things make it difficult: First, your bankers do not like to disclose exactly what their cost is; very naturally the harder the bond is to sell, the larger number of points that they take for the cost of selling, and justifiably so, but also the more reticent they become in disclosing that, because it is an indication to anybody that is smart that it is a hard bond to sell.

Q. Is the illustration which you use very fairly typical of the amount of what such costs are?

A. That is typical of the amount of independent companies.

Q. Yes.

A. Now, if the Columbia Gas & Electric Company for instance, were to sell a bond issue on these particular properties they could sell it for less than 10 points, and so

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[fol. 431] could we, but if this property were to be promoted by you or I as individuals, and we were to attempt to sell those securities, that is probably about what we would have to pay. That constitutes no part of the interest rate or it does not correspond with the item of discount which is the difference between the par value of the security and the price at which it is sold to the public.

Q. Mr. Hamilton, in your judgment, what would be the actual cost of financing for the reconstruction of properties such as those involved in this case?

A. If it wasn't under securities back of a large company who could put pressure upon the issuance of a small amount of securities like this, it would probably cost ten per cent.

Q. An allowance of four per cent. is made in this case; what would you say as to that?

A. Four per cent. is absolutely too low, it could not be done for it.

Q. Is that a necessary part of the cost of construction of any plant?

A. Yes, sir, it is a part of the cost of money.

Q. Is there any difference in that particular between utilities and other properties?

A. None at all, except with the case of utilities and others—they would be on a manufacturing plant. The public has been educated up to a belief in the stability of the utility business and in a belief in the protection that is thrown around them by the approval of securities that are put out, by the Public Utilities Commission.

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[fol. 432] Q. In regard to the cost of financing this, there has been a great deal said about it here this morning, where an improvement or a new project is made by a parent company; what in your opinion is the reasonable percentage to be allowed for cost of financing?

A. Of this type?

Q. Of this type, yes?

A. We want ten per cent.

Q. You want ten per cent?

A. Yes, sir, in other words, the cost of that if I may revert just a little——

Q. Certainly?

A. If we can not make as much money, as much of a return on our money in our projects as we can with our money in some other man's projects, why we better go into the other fellow's projects. In other words, the fact that we have the money, is no reason why we should deprive ourselves of the return upon it—that is comparable to the return that we would get if we would loan it to the Columbia Gas & Electric Company, for instance, to go ahead with their projects.

Q. Now, I believe according to the way this has been carried here the cost of financing is listed at four per cent?

A. That is right, they have.

Q. Four per cent?

A. Four per cent in there.

Q. And can you think of any possible reason why the Dayton Power & Light Company should be willing to finance this at four per cent when your concern would ask ten per cent?

A. The Dayton Power & Light is not willing to do it, and

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[fol. 433] I will bet the Columbia Gas & Electric Company is not willing to do it. I think that is an engineer's idea of the cost of financing.

Q. Then you would say that very likely the engineers have gone a little outside their field in figuring this cost of financing here?

A. Well, they have set it away inside of ours, I will say that, because the amount is too small; it just couldn't be done on a project of that size, for that amount of money.

Q. Well then, you would say that was in the nature of an error against the company's interest?

A. Yes, sir.

Q. In the present case?

A. I do.

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[fol. 434] Q. Then their average cost of that would run about one one-half or maybe three per cent to sell the security?

A. Oh, no, you could not sell the securities for that. You are talking about pre-organization expense that had to do with getting the charter of the company, getting the permits to do business,—In this, making your contracts with the people who are going to supply you the money, drawing up your agreements in that type, getting a tentative agreement with the City Council as to the rate that you can charge—something that you have got to know before you can raise money on the project, and things of that kind.

Q. Well, as representing the purchaser, have you ever paid as high as that?

A. Why, yes, many times.

Q. What was the lowest you ever paid?

A. Oh, I don't know as I could recall that, because I have bought a good many billion dollars worth of property.

Q. Well, was it lower than four per cent?

A. For finance cost?

Q. Yes.

A. No, I never paid as low as that. Don't get the four per cent confused with pre-organization expense. They are two distinct and entirely different things and they come in different directions. The pre-organization expense

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[fol. 435] will be spent by the company itself and reimbursed from funds of their own and other finances, whereas the four per cent is spent by the company, but is finally paid out to individuals by the bond house or brokerage house in payment to their salesmen of commissions and salaries for the selling of the securities—something entirely different.

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[fol. 436] Chairman Geiger: Well, now, the books seem to indicate that they are not to charge as a part of the construction value of your property or cost of your property, the broker's fees that are paid, because you have to pay money to get the use of money, the theory being that the reconstruction value is to be determined by what it would cost the person to construct it who has the money to do it. Now, you don't agree with that theory?

The Witness: I know it would be awfully hard to get me to put money into my own business and get no return on it if I could loan it to John Smith and let him put it into the same identical business and he would pay me a re-

turn on it; I would have to be half-witted to do it—to put it into my own business and deny myself a return on it.

Chairman Geiger: What proportion of the money that goes into the construction of the plant is produced by the sale of bonds?

The Witness: Probably varying amounts according to the particular structure, but I would hesitate—oh, you might get half of it by bonds.

Chairman Geiger: And the other half?

The Witness: The other half—if it were large enough, I mean if it was something worth three or four million dollars would probably be raised, half of the remaining half by preferred stock, and the remainder by common stock.

Chairman Geiger: And the profit really to the person who builds the plant is in the prospect of getting the divi-

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[fol. 437] dend upon the amount of money they have finally put into the common stock?

The Witness: That is perfectly true. The bankers endeavor to the best of their ability to take no risk whatever and they take the bonds.

Chairman Geiger: In bonds and preferred?

The Witness: Bonds and preferred.

Chairman Geiger: Bonds and preferred?

The Witness: And the common has to take all the risk and therefore the common has to get a larger rate of return on that portion of the money and usually, he takes all the loss if there is a loss.

Chairman Geiger: And usually the preferred takes a loss if there is——

The Witness: Well, he comes next, before the bankers, when the bonds are lost, and I have seen them lose the bonds.

Chairman Geiger: Well, you would say bonds 50 per cent, preferred 25 per cent, common stock 25 per cent.

The Witness: Yes, sir, if it were an electric property in that situation, you might get as high as 60 per cent on bonds.

Chairman Geiger: Well, then, do you give 7 per cent over the period that the money is employed in the construction for that portion of it which comes from the sale of the common stock that you did not have to pay any dividends on?

The Witness: You don't have to.

Chairman Geiger: And you are investing it, because you have hopes of making a large income upon the amount you invest.

The Witness: That is the basis, but if you denied them

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[fol. 438] dividends on it at the very beginning, it would be awful hard to persuade them it was a very helpful outlook.

Chairman Geiger: You are going into the common stock or taking common stock in there in the expectation of making large returns; you don't think you could guarantee the seven per cent required on the jump when your money is being engaged or employed to produce the thing that is going to produce a higher rate or are you laying it open for a higher rate?

The Witness: I don't see any reason why, because I choose to invest my money in common stock and somebody else chooses to invest theirs in bonds that there should be any bars put up against my earning. I don't know why my money should be singled out to put a curse on, in effect.

Chairman Geiger: Well, you have no limit in the amount of money you can make on it, except such a limit as the court puts upon your rate whereas the preferred stock and the bonds must take the fixed rate of income, and that only and be satisfied.

The Witness: But the premium which I get and which people look upon as a premium is there, because I take the risk.

Chairman Geiger: You only take 25 per cent risk, but you get 100 per cent.

The Witness: No, I take 100 per cent risk with my money and I get 25 per cent interest in the property.

Chairman Geiger: All right. Now, is there anything else? These fixed charges seem to indicate that in considering the borrowed money that goes into a plant, that the discount you get for the sales of your bonds and the cost of getting the money are all one thing, and it is all amor-

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[fol. 439] tized and it should not be capitalized.

The Witness: I haven't in mind the thing that you are quoting, but that discount, what is usually meant, is the difference between what the bonds are sold to the public for, we will say 96, and the par value, and does not refer to

the cost of the selling. For instance, this Commission here authorizes securities for us and for other companies every once in a while, and in their order; they will put that "These bonds can not be sold at less than 90" or "Can not be sold for less than 85," or some other limitation. Now, that is the price at which they go to the public and the difference between that price is discount, and that discount is reduced as the interest rate which those securities carry is increased, but that has no relationship to the amount that is paid to the bond house to sell them or the cost which you incur if you sell them yourself.

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[fol. 440] Q. Mr. Hamilton, in a case such as is before the Commission here, in considering the question of amortization of the cost of financing or the treatment of the cost of financing, is there any way that that cost of financing could be realized by the company, except through capitalization; is there any way of amortizing it in such a case as is presented; is there anything put anywhere in the rates for that purpose, in other words?

A. Oh, I could conceive of the Commission making an extra allowance of one per cent for a period of years in the earning capacity, but I never have known them to do anything like that.

Q. The way it is done, is to include the valuation?

A. Yes, sir.

[fol. 441] FRANK PARKER testified:

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[fol. 442] Q. Dr. Parker, where do you reside?

A. Philadelphia, Pennsylvania.

Q. What is your profession?

A. I am Professor of Finance at the Wharton School of Finance & Commerce at the University of Pennsylvania.

Q. Of what college or university are you a graduate, if any, and what degrees did you take and when?

A. Graduate of the Wharton School of Finance and Commerce of 1911 with a degree of Bachelor of Science, University of Pennsylvania Law School in 1915, with degree Bachelor of Laws; of the graduate school of the University of Pennsylvania in 1923 with the degree Doctor of Philosophy.

Q. How long have you been an instructor in the University?

A. I have been teaching at the University of Pennsylvania for nineteen years.

Q. In what departments?

A. Department of Finance, teaching the subjects, banking, money and credit, public utilities, business cycle.

Q. In connection with your professional duties as an instructor there, have you had occasion to study carefully, scientifically, the question of the cost of financing business institutions, including utilities?

A. Yes, I have had a great deal of experience along that line. Since my graduation I have undertaken at various

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[fol. 443] times scientific and factual studies and investigations of the various problems connected with the cost of financing utility and non-utility enterprises, partly my own initiative and in part at the request of companies that desired to have a complete factual investigation made of certain phases of financing which industrial- and utility-enterprises frequently encounter.

Q. What do you mean by the cost of financing in business institutions?

A. The cost of financing is really composed of two elements: It includes first the mechanical cost of financing, which includes the cost of preparing, printing, engraving, registering and distributing security issues, whether stock, bonds or notes, as well as the cost of recording mortgages and other necessary papers; counsel for the trustees' fees, expenses and so forth;

Second, it includes the cost of obtaining money realized from the sale of such securities, being the sums that are paid to bankers for their services in effecting the sales of the company's securities. This second element of the cost of financing represents the difference between the price at which the securities are sold to the banker by the utility and the prices at which the bankers in turn sell them to the investing public. It includes a reasonable compensation to the bankers for their services in marketing the securities and forwarding the sums received, to the utility; the expenses incurred by the bankers in checking the engineering survey, checking the material facts, locally and affecting the development of the enterprise, in checking the analysis or

the prognosis made of operating revenues and expenses, to-
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[fol. 444] gether with all of the expenditures incident to the negotiations between the promoters of the enterprise and the bankers; it also covers the sums of money expended for planning and developing adequate advertising in the sales campaign by the bankers. In addition to this, the cost of obtaining money includes the services of the banker.

Commissioner Klinger: The what?

The Witness: Which he assumes.

Mr. Mullin: Of the banker.

The Witness: In underwriting—the banker.

Commissioner Klinger: I did not get it. You said it includes also the cost of——

Mr. Mullin: Services of the Banker.

The Witness: Services of the banker for the risk which he assumes in underwriting the issue.

Chairman Geiger: Do you mean he gets an additional cost in addition to the discount?

The Witness: Well, this is not discount at all, Your Honor; this is cost of obtaining money, which is a compensation made to the bankers, and the compensation being payment for these various services which I am now detailing.

Q. Proceed further if you have anything further?

A. This factor of risk in the cost of obtaining money is merely compensation for insuring the enterprise whether it is a commercial- or utility-enterprise against the risk of losses due to unsatisfactory changes in the investment market and undue allowance on the issue over the arrangement of the salesability of the security; and finally the compensation to the banker, which is included in this item of cost of obtaining money, covers the time, effort and money ex-
[fol. 445] pended by the banker in maintaining a market for the securities immediately following their flotation. It is a matter of common practice for the investment bankers to take such steps as are necessary to maintain the price of a new security at or about the price at which they are originally offered to the public, in order that any exceptional, perhaps untoward or unfortunate activities in the security market may not be reflected in the market price of the se-

curities in question and thus give an inaccurate idea of their inherent worth.

Q. The matter of combined discount was mentioned by one of the commissioners; what is the difference between cost of financing and bond discount as you understand the terms, of securities?

A. The two items are entirely separate and distinct, in my judgment.

Discount is the difference between the par value of the securities and the prices paid therefor by the investor. Discount is a function of the interest rate, and therefore, of time, in that it is an adjustment of the stated rate of return on securities to current rates or ideas prevailing in the investment market at the time the security is offered to the public.

On the other hand, the cost of obtaining money is, as I have just stated, compensation for services rendered by bankers, and is in no sense a function of time—or perhaps I can make that clearer by an illustration:

The difference between the par value of a bond and the price paid therefor by the investor represents a discount or interest, which, when averaged over the life of the bond, in conjunction with the interest which is periodically paid

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[fol. 446] by the company, gives the investor an average yield approximating the current yield of securities of the character in question.

For example, a utility may be able to sell to an investment banker a ten year first mortgage, seven per cent. bond at a price which will enable the latter to offer this bond to the public at par. In this event, there is no bond discount as the term has been defined.

Chairman Geiger: What is that—will enable them to offer it at par?

The Witness: Yes; he might sell to the investment banker a seven per cent. ten year bond at a price which will enable the investment banker to offer it to the public at par, in which case, there is no bond discount.

On the other hand, the same utility may sell a six per cent. ten year bond to the bankers at a price which will enable them to offer the bonds to the investing public at 92.89, which represents a seven per cent. basis if interest is paid semi-annually. In either event, the bond holder buys a

security, which, if he holds to maturity, will show him the yield of seven per cent. per annum on the money which he has invested.

In the first case, he receives seven per cent. in each and every year, while in the second case, he receives in advance the equivalent of something over one-half of one per cent. per annum for the entire period, which represents the difference between the price that he paid for the bond, namely 92.89, and par, 100, and thereafter, he receives interest at the rate of six per cent. per annum upon the face of the bond, which is equivalent to seven one-half per cent. ap-

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[fol. 447] proximately per annum on the cash price which he has paid for the bond.

Chairman Geiger: Now, right there: What does your experience lead you to believe that a first-class, high-grade, seven per cent. utility bond should sell for on the average market? Should it sell for a lesser amount than par? What does the investor expect on a return of a high-grade utility bond, where he would not take into consideration the question of security? Get seven, six per cent., or five one-half per cent.—be sufficient for the investor?

The Witness: Well, the yield which the investor would demand on the money which he had invested would vary with a variety of factors affecting the investment market.

Chairman Geiger: Well, we all know that, I am asking you in the last four, five years.

The Witness: Well, bonds in the last four or five years, have been sold to the investor at a yield which will average somewhere between five one-half and ten one-half per cent., depending upon the type of utility involved—that is whether it is a railroad, whether it is an electric line, and power utility, whether it is a natural gas utility, whether it is a water company—because there is no average that you can strike for utilities as a class and say that the investor is satisfied with that yield as an average. It will vary with the type of utility.

Commissioner Bricker: Could you tell us on a gas utility?

The Witness: A gas utility would undoubtedly have a much higher rate for the investor in order to give him a yield commensurate with the risk that he assumes when he places his funds in that property, rather than in some of the other utilities.

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[fol. 448] Q. You mean natural gas?

A. Natural gas, particularly.

Chairman Geiger: Well, have you studied the property of this particular company which we now have under examination?

The Witness: I am only generally familiar with it, as I have made no physical examination of it whatever.

Chairman Geiger: You regard a gas company, a natural gas company as a hazardous investment.

The Witness: Undoubtedly so.

Chairman Geiger: Naturally so?

The Witness: Undoubtedly, and the investor so regards it.

Q. You spoke about it, Doctor, as though you were considering the question primarily from the standpoint of the investor rather than from the company as such. That is the practice?

A. Well, that is the viewpoint which has to be assumed by any investment banker or company desiring to raise money from the public.

Q. Do the costs of financing as you have described it, occur, regardless of whether the securities are sold at par or below par?

A. The cost of obtaining money or the cost of financing as I have here described it, prevail regardless of the price at which the securities are sold to the public.

Commissioner Bricker: If the sold securities bring a return to the company equal to par, there is no additional cost beyond that? Is there still a cost of financing that in your judgment should enter into the rate base?

The Witness: Undoubtedly, represented by the spread

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[fol. 449] between par and what the company receives from the bankers at the time the securities were sold by the company to the bankers.

Commissioner Bricker: And naturally, should be considered as a part of the cost?

The Witness: That is the cost of obtaining money or the cost of financing as it is sometimes called, and in my judgment should be a very definite part of a rate base.

Commissioner Bricker: Regardless of the sale price of the securities or the return to the company of the money from the sale.

The Wtiness: I am not certain if I understand the question, regardless——

Commissioner Bricker: Read it.

(Previous question read.)

The Witness: Yes, because the cost of obtaining money represents dollars which ostensibly the inventor has put into the property into which he has invested his funds, and therefore represents as legitimate an item of the cost of bringing every dollar of cash into that property as the sales' commission on the cost of every unit of physical property included in the value of the plant. The sales' commission is always included in the unit costs which are considered by investors in determining the physical value of your utility, and there is no reason, therefore, looking at it logically, and in fairness to the investor, to say that the sales' commission which you have to pay to the agents to raise your money for you should not likewise be included in the capital structure of your utility.

Q. If such expenditures are not capitalized, is there any

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[fol. 450] way that the investor in the corporation would receive any benefit whatever from those expenditures?

A. None whatever.

Commissioner Bricker: They are no more real than the discount on your securities that you pay for the marketing of them?

The Witness: They are, if I may beg to differ with you, very much more, because one can be eliminated by the adjustment in time, fixing your interest rate to correspond to current yields by changing your coupon rate of the security, or the dividend of your stock, but the other is borne regardless of the price at which the securities are sold by the bankers to the public, because it represents a very tangible, palpable expense item involved in bringing every dollar of cash which the utility needs, into the utility property. It must be paid to the bankers, or the bankers will not render the service. It is therefore a tangible expenditure of tangible dollars.

Commissioner Bricker: If the complete spread between par value and the return to the company on the sale of

securities is amortized over a definite period of time and the rate permitted upon that basis, would that same conclusion still hold?

The Witness: Yes.

Q. Explain that please, Doctor, explain the difference between the cost of financing and bond discount in that connection?

A. But I am not certain if I understand that question correctly.

Q. Well, just go ahead and answer Mr. Commissioner Bricker as he asked it?

A. All right, please read it.

(Previous question of commissioner read.)

The Witness: For the reason I have already stated that
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[fol. 451] unless the cost of obtaining money is capitalized, the utility will have been deprived of its use and the stockholders will in turn be deprived of a stated rate of return —whatever it may be—upon the money which they have invested. Secondly, the problem of amortization does not affect the capitalization of this tangible or palpable cost in my judgment one whit more than the amortization of physical property affects the fairness and the justice of including the value of physical units in your property. For example, amortizations of physical units characterized by reserves for renewals and replacements is supposed to take care of a gradually changing physical structure of the property, and despite that amortization, every group of physical property included in the plant as used and useful is included in the fair value of the utility. In exactly the same way, the corporate structure of a utility as indicated by your consolidations and mergers and reorganizations, in time passes out of its period of original usefulness and amortization to take care of the cost of creating that structure through the sale of securities, in no wise therefore derogates from the validity of the capitalization of that cost.

Chairman Geiger: Would you give me a little theory on this? What reason is there that the rate payer should pay the cost of producing the money? That is a simple question and give me the theory as you have it.

The Witness: Because, unless the investor whose funds go into the utility property designed to serve the public, is protected in his investment, utility properties will not be originated in the first place, nor developed and extended

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[fol. 452] in accordance with the growing needs of the community, in the second.

Chairman Geiger: That don't answer the question at all.

The Witness: Well then, perhaps I misunderstood your question.

Chairman Geiger: The whole theory is this, is it not: That a rate shall be granted to a utility which will not permit the confiscation of the property; is that correct? That is the function of the law, only.

The Witness: Legally?

Chairman Geiger: Yes.

The Witness: That is the standpoint of the law courts.

Chairman Geiger: The what?

The Witness: The standpoint of the law courts.

Chairman Geiger: Yes.

The Witness: From the standpoint of Commission regulation it involves a fair return.

Chairman Geiger: Well, a fair return.

The Witness: That is correct.

Chairman Geiger: A fair return, it is assumed to be is one that is non-confiscatory.

The Witness: No, it involves something in addition to that.

Chairman Geiger: Either that or more?

The Witness: That is correct.

Chairman Geiger: That is the court will step in and prevent the confiscation of your property by too low a rate; but the court will not step in to prevent the payment of too high a rate, that would produce a rate much higher or an income much higher than that which the court would

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[fol. 453] declare to be confiscatory.

The Witness: I think that generally expresses it as I understand it.

Chairman Geiger: Now, you, in your structure, have advanced the theory that the rate-payer should pay an income upon the cost of raising money; that is the theory you are working upon now isn't it?

The Witness: That is correct.

Chairman Geiger: Will you tell me why the rate-payer has any business to pay a rate to pay somebody to raise money which they ought to have had before they ever started to build the plant?

The Witness: Well, perhaps I can explain that a little.

Chairman Geiger: Let me get it before you in this illustration: Here is a million dollars of property that is invested in a public utility; ten men come together and they have in their pockets one million dollars. That is their money. They are going to invest it in a plant which is to produce them an income. That is perfectly correct, and right. They should have an income on the million dollars with which they started out, but as I understand your theory, it is that you are going to pay them for going out and raising money upon which they are to be paid a rate. The money was not theirs to begin with. If they had a million dollars to invest, then they do not have to go out and pay any banker any money to get it for them; they have already got it, and they are going to invest it in a plant out of which they are going to take an income.

The Witness: Well, if I may suggest, Your Honor, the

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[fol. 454] case which you have cited as an illustration is one which in my practical experience would happen once in one thousand times.

Chairman Geiger: Well, that is all right, but——

The Witness: And the other 999 cases would be where the ten men locally, and without desiring to have any intermediary banker invest in their utility, would have to raise that money locally by their own efforts, and the expenditure that they would have to make, if each had the cash which they risked, would be exactly equivalent to the expenditures which bankers would have to make if they had been called in as intermediaries to raise the money for that public utility property.

Chairman Geiger: You do not seem to get my point. We are trying to provide a just rate for the investment of a million dollars. That presupposes that the million dollars exists already to be expended, in the hands of those who are going to invest it in a public utility. I can very well see that the special group or whatever it may be that has a million dollars to invest, should have a fair rate upon that, but I can not quite grasp the situation that when a number of people that have not any money at all—nothing

—they go out and borrow a million dollars which they never possessed before, and having borrowed the million dollars, then they want to be paid a rate which will pay them a proper and fair income on a million dollars which they never owned. Do you get my point?

The Witness: I see your point and I think I can answer it for you.

Chairman Geiger: Well, I wish you would.

The Witness: The assumptpion that you have in your development of every public utility—men with an adequate

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[fol. 455] amount of capital to sponsor, organize and develop the utility, is not borne out by my knowledge of the facts of the early history of almost all utility properties in the United States.

Chairman Geiger: I grant you that, but I don't concede it answers the question.

The Witness: I think the remainder of my answer will at least endeavor to answer you more specifically.

Chairman Geiger: All right.

The Witness: That means that the developers of public utilities to serve locally the communities in which the utilities are planned to operate, can raise from their own savings or accumulated wealth only a part of the money necessary properly and adequately to sponsor and develop a utility company. The remainder must be raised by them either at the expenditure of their own time and money and service, which is the cost of obtaining that money which they raise from outside sources from local consumers of the utility themselves, as has happened in innumerable cases in every state in the United States, or they bring in some banking firm, who, because of its established connections, its experience in the money and investment market, its knowledge of investment business and the types of securities available to that utility, can perhaps do the job in less expensive fashion than the local enterprisers or sponsors of the utility enterprise may themselves do.

If you take that second illustration, I think it answers on all fours the question which you have raised, because being in accord with the historical-financial development of our utilities, it shows you that the major part of the funds necessary to initiate and develop public utility properties

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[fol. 456] have not been contributed by the men who originally conceived them, but have been contributed or sponsored by the savings that have been invested therein perhaps by local investors or investors scattered in more remote regions.

Chairman Geiger: That don't begin to touch it as far as I can see. I see what you mean by this, that a utility, if it has gone on and has some savings, hasn't enough savings to go ahead and make the increase in its equipment, such as it needs and therefore, it goes out and borrows money to do so; that is what you have in mind.

The Witness: No, that is only part of it.

Chairman Geiger: Well, it is part. You have that in mind. But we are theoretically starting out with no equipment at all—no company at all. We are starting out to reconstruct ab initio the present existing plant. Manifestly you have got to have money to do it, and that money should belong to somebody who is going to put the plant up. They have started to build it, otherwise they are making the public pay them by the rate, to raise money which they are going to invest for their own benefit in a plant, in lieu of money that should have belonged to them, before they ever started to build, because the fair rate should be paid upon the amount of money that is invested in the plant and not the amount of money that it takes to build the plant, plus the amount of money that it takes to get the money to build the plant. The money should have been on hand when you started to build the plant and I can not yet see why the rate-payer should be compelled to pay a rate upon an expense that a group must be put to to get money which they didn't

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[fol. 457] have. You go out and borrow it from a banker; they start out with 50 per cent. of their money; they should have had it all is the way I look at it as far as rate cases is concerned. Am I wrong in that point? I see how it works, of course. That is the way you do it, but theoretically, when you get down to the income that is to be paid upon this million dollars, it should be paid for the million dollars, and it wouldn't be paid on what it is going to take to raise the million dollars. The million dollars should already have been raised before they start to build, theoretically, I mean.

The Witness: Yes, but Your Honor, I think there is a slight misconception on your part of the way in which the money can be raised. The moment you assume that the sponsors of the utility do not have in their own banks or in their own jeans sufficient amount of capital adequately to sponsor the development of the utility then that moment you assume or force the assumption of the necessity of going to the public in that community or other communities and raising the million dollars necessary to sponsor the development of your utility.

The moment you make that second assumption that it is necessary to go to the outside, either to owners in the form of stockholders, or to creditors in the form of bondholders, to bring in the balance necessary to raise your total fund to a million dollars, you carry with you the necessary secondary assumption that time, effort and money must be spent to bring that million dollars into the aggregate mass necessary to start that utility plant. And secondly, I think I can answer you from another angle:

The expenditure of time and money to bring into an

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[fol. 458] aggregate mass the capital necessary to initiate a utility, is just as much an expense of the users of that utility as it is for those same users to incur in the physical value of the plant, the sales' commissions which the manufacturers of the equipment and the physical material that goes into the plant have to pay to their salesmen in order to sell those materials to the utility in its physical aspects. If it is justified in the physical plant per se, then it is simply a translation of terms to say that it is doubtful in bringing dollars—which are commodities, essentially—into the hands of the initiators and sponsors of the utility.

Chairman Geiger: Well, the trouble is, you bring them in twice; you bring them in once to get the dollars and once to get the physical plant in which the dollars are transcribed or transmuted.

The Witness: Well, that is—because unless you pay to get the money, you would never have a utility property physically.

Chairman Geiger: Now, is not this the correct way to look at it—I am just groping in the dark—I know you so testify, but we will assume that a group of people desiring to build a utility have $100,000.00 on hand; they have got

to pay that $100,000.00 in order to get available for use a million dollars. They only then have the million dollars; they put in it, their one hundred thousand dollars, which makes a million one hundred thousand dollars. Should the rate be paid upon the million which they produce by the use of their one hundred thousand dollars, or should it be paid upon the million plus the one hundred thousand dol-

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[fol. 459] lars, the one hundred thousand dollars being the only thing they had in it, and that they had to raise the rest as capital which they had never therefore possessed? Do you see my point?

The Witness: Yes; the rate should be paid on one million one hundred thousand dollars, because unless it is investors will automatically refuse to invest their funds in public utility properties, because they will instanter see that the moment they invest a dollar in a public utility property not recognizing this cost of bringing dollars into the property, will immediately deprive the stockholders of anywhere from twenty to thirty-five per cent. of the initial amount of cash that they invested in the property. If you will give me time, I will be glad to give you a detailed illustration for it which I have worked out.

Q. Go ahead.

Chairman Geiger: Well, we see the theory of that. You do not need to do that. Well then, that results in this, that the person who has the $100,000.00 to begin with gets an income on $100,000.00 which he owned and on which he should have an income, and he gets an income on what that $100,000.00 bought, to wit, the whole of the other million—the rest of the million one hundred thousand dollars.

The Witness: That is correct. He is entitled just as much to a return on his one hundred thousand dollars which he spent in raising the million as the individuals are who gave the million or invested them in the public utility property. I think I can make that quite clear if I may have a moment.

Commissioner Bricker: Do you mean by that that you feel a return should be upon the investment or upon the

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[fol. 460] value of the property?

The Witness: Well, I am now assuming that there is a reasonable approximation between the total fair valuation of the property and the total approximation of the stock outstanding.

Commissioner Bricker: That, of course, is not a fair assumption in this case.

Mr. Mullin: However, it answers the theoretical question that is submitted to the witness, I think.

Chairman Geiger: He is answering my question about the cost of raising the money at present. That is all.

The Witness: If I may give you that illustration, Your Honor, I think perhaps it will be cleared up for you.

Mr. Matthews: Go ahead.

The Witness: In this example, it is assumed that your total fair value of the utility is ten million dollars. Sixty per cent. would be represented by bond money, twenty per cent. by preferred stock money and twenty per cent. by common stock money.

The amount of bonds that would have to be issued under this assumption to the investors at par to yield six million dollars to the company would be determined by the cost of obtaining money which as has been applied to this illustration of 5.907 per cent.

Commissioner Klinger: What is the idea of six million dollars?

The Witness: Simply for the purpose of illustration, I have taken a ten million dollar fair value of public utility property.

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[fol. 461] Chairman Geiger: Did you say ten, forty and twenty?

The Witness: Sixty, twenty and twenty.

Mr. Mullin: Sixty per cent.

The Witness (continuing): Bonds, 20 per cent. preferred stock and twenty per cent. common stock. The total par value of the securities that would have to be sold to net the company six million dollars in cash, subsequently to be invested in this plant, would exceed six million dollars, par value, by the total expenditures made in obtaining the money. Assuming now, that they issued the bonds and the stock at par, the question immediately arises how much in addition in order adequately to take care of the expense of bringing in the six million dollars in cash, they would have

to issue per value of bonds to net the company six million dollars? In this example, assuming that your cost of money is as I have stated, it amounts to three hundred seventy-six thousand six hundred seventy dollars, so that the utility would have to sell $6,376,670.00 of bonds in order to receive net six million dollars in cash for investment in this physical plant and property.

With preferred stock, exactly the same method of calculation is applied and the result in this case shows that $2,185,505.00 par value of preferred stock would have to be sold to the investor at par in order to net the company two million dollars in cash. By the same process, the amount of common stock that would have to be issued with the cost of money approximately twelve per cent., to net the company two million dollars in cash would amount to two million two hundred seventy-two thousand seven hundred twenty-seven dollars; consequently, $10,834,902.00 of securities will have to be issued at par to the ultimate in-

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[fol. 462] vestor to yield the company ten million dollars to invest in this property, after the cost of obtaining the money has been defrayed. The relationship between the cost of obtaining money——

Chairman Geiger: Ten——

The Witness: Ten million eight hundred thirty-four thousand nine hundred two dollars. The relationship between the cost of obtaining money, expressed in dollars and the equities which the common stockholders now possess in the ten million dollar property is indicated by the following figures:

The total cash received by the company from the bankers is ten million dollars, and the total par value of the bonds and preferred stock now outstanding representing dollar for dollar, the money provided by the ultimate investor is $8,562,175.00, the balance representing the equity of the common stock, assuming that no allowance——

Chairman Geiger: Just a moment—go ahead if you get the question.

The Witness: Assuming that no allowance is made for the cost of money in any valuation of the public utilities property, immediately following the construction of the property it amounts to $1,437,825.00—while the common stockholder has paid $2,272,727.00 of cash for his stock, yet

if the cost of obtaining this money is excluded from the total value of the utilities property, then the equity in the property representing the allowed part of the raised dollars belonging to the common stockholder would amount to $834,902.00 less than the actual amount of money which

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[fol. 463] he has contributed to the enterprise.

In a word, if the cost of obtaining the money is not allowed, and is eliminated, the value of the public utility property approximately 38¾% of the common stock of your original, paid into the property in cash, has immediately disappeared.

Chairman Geiger: Well, I don't quite catch it. I see very well that he starts out there as a common stockholder with—how much money?

The Witness: He pays in $2,272,727.00.

Chairman Geiger: Well, that two million was all he had.

The Witness: No, two million is what he had to pay; $272,727.00 had to be expended in order to get the two million net in cash to the utility.

Chairman Geiger: Well now, just where do you get the theory that a person who is going to engage in the sale of common stock or the building of a corporation out of which he is to get money and a rate is to be paid for getting the money which he should have had—that money—when he started.

The Witness: But he can not get it without the expenditure of money.

Chairman Geiger: Well then, he will have to build his plant, get the million dollars, if you are going to put the rate up——

The Witness: Well, it is exactly the same fact—you wouldn't exclude sales' commission for a moment, the commission of the salesman of the seller of the equipment—

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[fol. 464] the material property that goes into the physical plant.

Chairman Geiger: What that amounts to is this, your stockholder starts out with nothing for your common stock; he has not got anything—just a bunch of fellows getting together and say, "We are going to build a utility"; that is all theoretically; he has no money.

The Witness: Well, the promoters of the enterprise.

Chairman Geiger: How?

The Witness: The promoters?

Chairman Geiger: The promoters of the enterprise have nothing. By this sort of an arrangement, they pay $272,000.00 of money that did not belong to them to borrow two million which did not belong to them, until they got it. They say; "We have now got $2,272,000.00, and we didn't have anything to start with. We will fix a fair rate on what we have pulled out of the air for the public utility, then we have got to sell preferred stock and sell bonds, and that will cost us money and we must be paid for that." The result will be at the end of the operation with ten million dollars worth of bonds outstanding, the bankers have been paid $834,000.00 and the common stockholders have two-million dollars worth of stock that they got out of the atmosphere and did not pay a cent for the money that they borrowed for themselves.

The Witness: No, no.

Mr. Mullin: You have a misunderstanding, Mr. Commissioner.

Chairman Geiger: No, I understand it.

Mr. Mullin: Explain that, please.

Chairman Geiger: I am talking about the capital that goes into that structure.

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[fol. 465] Mr. Mullin: Explain that again, Doctor.

The Witness: In the first place, this money has not been borrowed. There has been sold to the common stockholders, the genuine owners of the property, the owners of the equity in the property, at par, stock to the value of $2,272,727.00, and the stockholders, common stockholders, have stock certificates of a par value equal to $2,272,727.00.

Chairman Geiger: For which they paid what?

The Witness: $2,272,727.00.

Chairman Geiger: Not their money, but whose money?

The Witness: That is what they paid for the stock.

Chairman Geiger: Of their own money?

The Witness: Of their own money.

Chairman Geiger: All right.

The Witness: Now, there goes into the property two million dollars flat because the expenses incurred by the promoters in raising that $2,272,727.00 of common stock money amounted to, under this illustration, $272,727.00.

Chairman Geiger: Well then, just stop right there. Then don't that amount to this: A group of ten people, we will say, for illustration, started out with nothing. Clean, so far as the money was concerned, and they went out and used $272,000.00 to borrow two million dollars; is that right?

The Witness: You mean to bring in additional owners to the extent of two million?

Chairman Geiger: To bring in two million dollars.

The Witness: Of common stock?

Chairman Geiger: Of common stock.

The Witness: That is all right, that makes them owners,

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[fol. 466] not creditors.

Chairman Geiger: They did not have anything to start with; they had no money to start with, did they?

The Witness: No.

Chairman Geiger: And they paid $272,000.00 to be enabled to bring in to them—who never had any money before—two million dollars. Now, why should the rate-payer pay that?

The Witness: Because the rate-payer assumes that when he pays for stock which has a par value of $2,272,727.00, that he is going to have that additional $272,000.00 allowed in the rate base, so that he has, as the common stock owner should have, that counted in the rate base, upon which a fair rate of return will be granted to him.

Chairman Geiger: That is all right, but he never had the $2,000,000.00 to start with.

The Witness: I beg pardon.

Chairman Geiger: That is all right, but he did not have any two million to start with; he did not have anything to start with; he used $272,000.00 to get two million, which he never had before.

Mr. Mullin: I think that——

Chairman Geiger: I see it, never mind, go ahead with the next subject.

Q. Doctor, how much money, in the illustration that you have taken, is actually paid by the investors for the total amount of securities, bonds and stocks?

A. In this illustration?

Q. Yes, sir, the investors' money?

A. Ten million eight hundred thirty-four thousand nine hundred two dollars is actually paid by the investor,

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[fol. 467] at par.

Q. And the corporation got how much of that?

A. Ten million dollars flat.

Q. Questions have been asked of you that seem to be based on the assumption that somebody besides the investor was getting some money out of that; is there anything in that except the banker that sold the securities?

A. Naturally it has been a matter of practice since our present commercial and investment banking system has been operating, which is four or five centuries.

Q. Are there any promoters who get anything out of that ten million eight hundred thousand dollars?

A. None whatsoever.

Q. Then excess of the total of investment above the ten million which the corporation receives, is paid to the bankers or similar interests who actually raise the money and take it from the stockholders, the investors, who make the corporation; is that correct?

A. That is correct.

Commissioner Bricker: If this approximately eight hundred thousand dollars were amortized over the respective life of the different securities for which the amounts were paid would you then feel that the total amount should be allowed in the rate base?

The Witness: Yes, for the two reasons which I have heretofore stated.

Q. Repeat them please for us.

Commissioner Bricker: Oh, I remember them; I just wanted to ask that.

Mr. Mullin: Let me make this suggestion, that if nothing

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[fol. 468] is done except to amortize that $800,000.00, the investor does not get a cent of it; he merely gets his money paid back to him—and investors do not go into corporations on that basis—that he gets back only what he has put in. It must be capitalized or he gets nothing but the money that he advances.

Commissioner Bricker: That is true, it is a part of the property, of course, but it either should not be amortized or it should not be allowed in the rate.

Mr. Mullin: What is that?

Commissioner Bricker: It should either not be amortized or it should not be allowed as a part of the rate base—one or the other.

The Witness: No, I don't agree with that Your Honor, at all.

Mr. Mullin: Explain your position in regard to that.

The Witness: I thought I had made that clear with reference to the position of the physical property.

Commissioner Bricker: Should an investor be permitted to have his money returned to him and yet continue to earn a rate upon that money?

The Witness: Well, he does it with every scrap of physical property that goes into the plant, by your own accounting system, by which you set up reserves for replacement and reserves for renewals.

Commissioner Bricker: That is in order to keep it intact?

The Witness: It is for the same reason.

Commissioner Bricker: You are returning the investment to him when you permit it to be amortized?

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[fol. 469] The Witness: You never return it to him unless the property is completely liquidated.

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[fol. 470] Commissioner Bricker: Doctor, do you feel that four per cent is a reasonable cost for financing in a case of this kind?

The Witness: No, I think that is much too low.

Commissioner Bricker: You think that is much too low. Would you give any value to the inter-corporate relation of this company to the holding company in determining that cost?

The Witness: Some consideration would have to be given to that, but I don't think sufficient to bring that cost of financing down to a four per cent level.

Commissioner Bricker: What would be the economies that might result from a holding company operating such as we have in this case—and I presume that you understand that.

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[fol. 471] The Witness: I am generally familiar with these intercorporate relations. Well, I think there the effect would be simply to bolster up the credit of a natural gas enterprise and even with that bolstering, I sincerely raise the question whether you could obtain that money at a cost—not a discount—but at a cost of less than ten per cent.

Commissioner Bricker: You have not said yet at what this bond of a company of this character would sell at on the present market.

Mr. Mullin: We have not asked Doctor Parker.

The Witness: You mean the yield or the cost?

Commissioner Bricker: The cost.

The Witness: That is the actual cost of obtaining money?

Commissioner Bricker: Yes, of a natural gas property of this kind, including what you designate as the discount necessary to the bankers.

The Witness: Well, I wish to make my answer perfectly clear there. My answer considers and envisages only the actual cost of obtaining money—brokerage if you will—but excludes discount and viewing the problem from that angle, I don't think any natural gas property the size of this one could raise money sufficient to reconstruct that new at a cost less than ten per cent.

Commissioner Bricker: Then you would add to that, of course, the discount before you would compute the amount which the company would have available for investment purposes.

The Witness: But there might not be any discount if you made your coupon rate high enough in your bonds and your dividend rate high enough in your common or preferred stock——

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[fol. 472] Commissioner Bricker: Would you want to say what that rate would be?

The Witness: I don't know that I could answer it specifically for this property, but certainly the rate of return on the entire amount would vary with your corporate set-up, the proportion of bonds and proportion of preferred stock and proportion of common stock, but your fair rate of return ought to be ten per cent as a bed-rock minimum, assuming again that the fair value of your property approximates the capitalization of your company.

Chairman Geiger: Do you mean by those two figures then that the cost of getting your money would be ten per cent. and your discount ten more per cent.?

The Witness: Oh, no, I have not included discount in my cost at all. Discount is entirely excluded from my answer and I say discount might be excluded from the entire problem if we make the coupon rate of your bonds and dividend rate of your stocks high enough so that you could float those securities at par.

Chairman Geiger: But you think a security, seven per cent. gas security would cost ten cents on the dollar to sell it in the recent market?

The Witness: Seven per cent. bond?

Chairman Geiger: Seven per cent. bond.

The Witness: Yes, I think so; and your preferred stock would probably have to carry yield of eight to nine per cent. and your common stock ten per cent. or more.

Commissioner Bricker: That set-up would be per share under the reproduction theory because of the fact that the

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[fol. 473] courts have not allowed discount?

The Witness: Yes, if that is the opinion prevailing in the particular jurisdiction.

Chairman Geiger: Now, I understand counsel to state—and I will state it much more briefly and theoretically than he—but that the investor required not only his money back which he invested in the property, but he required a profit: otherwise, he would not invest his money. That is correct?

The Witness: He requires a rate of return on his capital invested.

Mr. Mullin: Oh, I am not saying that he requires his money back. His money stays in the enterprise. He never gets it back until the enterprise is ended and the whole thing is amortized.

Chairman Geiger: Well then, what does he require?

Mr. Mullin: He requires a reasonable return on his entire investment as represented by the value of the utilities property when it is a utility—but I do not want to be misunderstood. I did not say at any time and do not think that an investor gets his money back and still has a return on it. It is simply making the cost of financing exactly the same as everything else; it is a permanent part of his investment and of course, he expects a return.

Chairman Geiger: Well, don't they put in so much money? The investor demands more than the money he puts in; he demands profit?

Mr. Mullin: Yes, because——

Chairman Geiger: Well, that is all right. Now, I get it. Now, if the investor demands more than the money he put

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[fol. 474] in, he demands profit, what is the measure of the value of the property to the utility user? Is it the investor's money that goes in assuming that it is all invested dollar for dollar, or is it the value of the money he puts in plus a profit?

Mr. Mullin: Mr. Commissioner, you let me explain my answer so that I may not be misunderstood on the record. You are speaking about my answer?

Chairman Geiger: Go ahead.

Mr. Mullin: I am not answering for the witness, but straightening out my statement so that I will not be misunderstood by any of the Commission. When I said he expects a profit, I meant he expects a profit on his money so long as it remains in the corporation, and when I said he expects his getting more than getting his money back, I meant that merely returning to him as an amortization his investment is not sufficient for him; he wants his investment to stay there; that is the reason he put it in, and that is all he would want. I do not want to be misunderstood.

Chairman Geiger: But you did not mean that he would necessarily demand that ultimately, on the maturity of the bonds, his money be returned to him plus a profit?

Mr. Mullin: I wasn't thinking at all of that. I was merely comparing it with amortization and nothing else.

Chairman Geiger: All right. Well, however, let us assume it this way, Doctor, that the investor who goes into it, buys the common stock we will say, puts his money in at the price or to the extent that he expects not only to get back or get a security for the money he actually puts in, but that he expects to get a security and a return on the

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[fol. 475] money, that which causes him to buy—pay the money which he put in—is that fair to the rate payer?

The Witness: Yes, because practically if you do not work it that way, you would discourage all investment in utilities.

Chairman Geiger: In other words, it does not have any-

thing to do with the actual value of the property, but it has to do with the fact that unless you do treat them this way, they won't put any money in the property.

The Witness: No, I do not agree with you there. That does have to do with the actual value of the property because as I had stated, I think several times on the record, the actual cost of it, provided every dollar in the property is there, represents the materialized value of that dollar when it is in the property, just as the actual cost of bringing every scrap of physical property into the utility as physical property is in your engineering values, included, as the fair value of the physical property, so included.

Chairman Geiger: All right, I think we understand it.

Commissioner Bricker: Just one question; do you know anything about the history of how this company has been financed?

The Witness: No, I do not. I know the property only generally.

Chairman Geiger: Let me ask a question. You have broad experience in public utility. Now, generally, isn't this the way that they grow; That a rate was charged which was more than sufficient to take care of the depreciation and maintenance, and there was an accumulation of the surplus produced by the rate, which was ultimately invested, in

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[fol. 476] new property, and becoming then invested in new property, a new and higher rate was charged to the consumer in order that he might pay an income upon this new property, which excess of his collection produced, and so on, building it up gradually without really putting the amount of new money into it by virtue of going out and selling bonds that the additional plant cost in its erection.

The Witness: No, unfortunately my experience in all of the investigations and research studies that I hitherto referred to, are just the reverse of that. The long list of receiverships and reorganizations in public utility plants beginning with the history of those, in the United States from 1850 or '60 down to the present day indicate that in their early years, their rates were thoroughly inadequate, not only to net a fair return, but to allow them to develop a surplus or a contingent fund with which they could adequately take care of extensions and betterments and improvements in service and it is only after the long years of

trial and tribulation and particularly since more or less regularized and public commission procedure has been developed that the utilities have begun to secure a rate of return to which the investors that originally inaugurated the enterprise are entitled.

Q. Doctor, it is sometimes thought that cost of financing is a purely theoretical thing; what is the fact as to its being real?

A. Well, it is the most real, the most genuine, most tangible, most palpable, most physical thing that I can possibly think of; I kind of hesitate to say it again, because I have said it so many times, and I can not find any other adjectives that will adequately describe it thoroughly, but it is there; it has to be borne; it can not be escaped; the

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[fol. 477] bankers know that without it they would not subsist; the fellows that sell their securities locally know it, because they have to spend dollars to get their money in there.

Q. Are such charges incurred by non-utilities as well as utilities?

A. Yes, and frequently more by the non-utilities than by utilities; that is their cost to finance frequently is very much higher.

Q. In your experience in connection with utilities, have you ever known of a utility of any size, say in your state, of the kind—have you ever learned of a utility of any size that was constructed by a group of persons having a large amount of money which they themselves put into it.

A. Without bringing in any additional money?

Q. Yes.

A. No, I do not, but I know plenty of utilities there after they once having started, begun their development, discovered that their securities obligations or bonds, they were not able to amortize out of their earnings and they had to issue refunding securities in order to take care of their betterments and improvements.

Q. In your judgment, could any utility of any considerable size be constructed if it depended upon the investment of a few persons who became interested in the thing and invested their own capital and nothing else in it?

A. Practically impossible.

[fol. 478] Cross-examination.

By Mr. Browning:

Q. Pardon me just a minute, I have a question or two here. Doctor, this hypothetical basis that you organize here on the basis of $10,000——

A. $10,000,000.

Q. $10,000,000, pardon me; about 60 per cent. bonds and 20-20 of the two classes of stock; you said that the cost of financing would be approximately $834,000, or something like that. That is a conclusion that you have reached from the examination of various businesses, is it?

A. Not only public utilities; those costs of financing are predicated upon a study which I made in 1923, running

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[fol. 479] for a ten year period—1914 to 1923—actual cost incurred by going concerns in the public utility field of all types of public utility enterprises.

Q. Yes, and that, you say, would be applicable to a gas company, a separate gas company?

A. No, no, because the costs upon which that example is predicated are costs which were actually incurred by utilities already in existence as going concerns with an established record of earnings in back of them; some of them paying dividends on their common stock over a period of years, and therefore that cost is considerably less than would be involved under the theory of reproduction cost new value as of June 30, 1929 of this natural gas property, which would be a new enterprise without any record of earnings back of it; with all of the risk, therefore, in the mind of the investor, which any new enterprise would entail and hence carry sales' resistance in the sale of the units, and hence a larger cost of obtaining money than those figures which you have there.

Q. Ordinarily would that cost of financing be amortized in business as it actually is carried on?

A. No.

Q. It would not?

A. In commercial and industrial enterprises, the cost of obtaining money is, in fact, as all of these other items are, all thrown into the capital account. I could be the chairman of a large investment trust and the cost of bringing

the money into the investment trust is thrown into the capital account, regarded as issued.

Q. And never amortized?

A. No, sir.

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[fol. 480] Commissioner Bricker: Upon what facts do you base your answer that this would be a sound, financial

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[fol. 481] propositions from the investor's standpoint if it were three-fourths power and one-fourth gas?

The Witness: Because natural gas, as I understand it—the facts—is in an experimental state, and electric rates are past that now and demonstrated that as to the future earning power and stability of their dividend policies. That is not true with the natural gas companies with which I am familiar, and I think I intimated that in my reply to Judge Geiger some time ago.

Chairman Geiger: Well, you do not regard then a natural gas distributing plant that has been in existence in this community for the last 30 years with being a true natural gas company as they now are organized?

The Witness: Well, when I say "experimental" I mean that relatively; I mean experimental on the strength of developing into earning power, units comparable in size and stability to the electrical utilities.

Chairman Geiger: Don't you know, as a matter of fact, a natural gas company has been distributing gas longer than the power company has been distributing electricity?

The Witness: I am quite aware of the fact.

Chairman Geiger: Why do you say power companies are no longer in an experimental stage but the gas company is?

The Witness: Because you cannot go in to an investment banker in New England and have him take a natural gas security and sell it to his customers—if he is a respectable banker; that is, he has been so conservative that he will not handle them generally as a banker and sell them to his investing public, but that is not true of electric utility securities.

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[fol. 482] Chairman Geiger: Well, that could hardly be true of the Columbia Gas & Electric which is composed

of a certain per cent.—I don't know what—of gas and a certain per cent. of electricity.

Commissioner Klinger: Three-fourths of electricity; one-fourth of the other.

Chairman Geiger: That is right, is it?

The Witness: But you take a natural gas property; take another utility service in the gross revenues and you will discover it with the respectable bankers from that section of the United States—I know in Pittsburgh the idea about what investment is is distinctly different, but that regard is on account of various physical factors. When I say experimental stage also I think that the change in the method of distribution, in the size and type of pipe lines which are being developed, indicates that—the long pipe lines running a thousand miles, or 950 miles, which are now being currently contemplated.

Chairman Geiger: Do you know what per cent. of this company now under investigation is electricity and power and what per cent. of it is gas?

The Witness: You mean the Dayton Power & Light?

Chairman Geiger: The Dayton Light & Power?

The Witness: Well, I think it is about 75 and 25.

Chairman Geiger: 75 what?

The Witness: 75 electric light and power, 25 per cent. natural gas.

Chairman Geiger: Well then, it is in the condition of the better grade securities?

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[fol. 483] The Witness: As a system, yes, but not as a gas property of itself.

[fol. 484] James A. Emery testified:

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[fol. 485] A. I think the cost would have been substantially the same. That is the same care in preliminary consideration would have been gone into.

Q. And the expenses would have been the same?

A. Yes.

Q. Turning to the question of the cost of financing, Mr. Emery, which is set forth here as four per cent, amounting

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[fol. 486] to $39,600.00 without detailed questioning, will you please take up that exhibit and give us your views on that?

A. This item, of cost, the cost of distribution of securities to the public. The business of distribution of securities is carried on almost like any other merchandising proposition; that is the security houses buy by the wholesale and sell by retail. So that all of their expenses of operation have to be taken care of and I consider that to be a part of the cost of reproducing any property. This item must not be confused with discount. Insofar as we have treated it here, it covers expenses only. We also did not include at this point, any of the expenses in connection with the investigations necessary by the security houses, which are paid for by the company directly.

Commissioner Bricker: Now, you say that this should not be confused with discount; will you just make clear the distinction between a security company buying at wholesale and selling at retail at a different price—the distinction between that and discount as it is ordinarily considered in the sale of securities.

The Witness: I think I can explain that best by an example, if I may. The company sells its bonds to a security house at 90. The security house sells them to the Public at 94; the difference between 90 and 94 is what we call cost of financing. The difference between 94 and par or face value is what we would call discount.

Chairman Geiger: Well, now, this four per cent; when you assume as cost of financing, finally carried forward and amortized on your income from your property—do you

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[fol. 487] regard that as an expenditure that must be attributed to the first year's erection, or the erection of the property before it is put into service, or would it ultimately be paid for by the rates afterwards, in the amortization of that difference in the case now of four per cent?

The Witness: I believe that there is no doubt but that it is an essential part of the investment, of the cost of placing the property in the service of the public.

Chairman Geiger: I grant you that, but won't it be repaid out of the rates coming back?

The Witness: As to its repayment or amortization, I see no reason for amortizing that any more than any other item of property except with respect to the similar cost on the bonds which will have to be incurred again when the bonds mature and are replaced.

Commissioner Bricker: If the Dayton Power & Light were going to extend its property into the City of Eaton, which is comparable in sixe to some of these other cities now under consideration—were going to reconstruct a plant in the City of Eaton; it would first come to this Commission and ask for authority to issue some sort of securities to take care of that construction program, would it not?

The Witness: I don't know whether that procedure would came before the obtaining of the franchise or not.

Commissioner Bricker: Under our statute, it would be perfectly possible to do so, and if the company asked to sell its securities, say it was selling seven per cent bonds to cover a major portion of the construction cost, and they could not be sold on the present market at par and would

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[fol. 488] ask that they be sold at say 95 or 96, that margin would be then amortized over the life of the bonds, would it not, in the ordinary financing of a construction program of that kind?

The Witness: May I have the question read again?

(Previous question read.)

A. Well——

Mr. Mullin: Do you mean if you are not a utility at all?

Commissioner Bricker: What would happen, suppose the company that you are financing is not a utility?

The Witness: The same thing.

Commissioner Bricker: That would be amortized you mean—the cost?

The Witness: I think so, if they could do it, if their earnings were sufficient.

Commissioner Bricker: How, in your experience, is it handled as a matter of fact, in non-utility cases, for instance? capitalize it or have it amortized?

The Witness: Well, I think good practice requires that discount on bonds be amortized.

Commissioner Bricker: How about the cost of selling, the cost of financing as you put it here?

The Witness; Well, as a matter of fact, cost of financing is usually recorded in conjunction with what I have defined as discount.

Commissioner Bricker: If you were selling——

Chairman Geiger: Now, right there: Suppose this is the fact, that when you go on the market to sell them, the purchaser takes into consideration his profit which he is

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[fol. 489] going to make by retailing and he takes into consideration what the public will pay for them and we will say he pays you 92 and sells them at 96, and he makes his four per cent profit and the public makes, the buyer makes some profit because he buys the bond below par. Both of those items go into one account and are amortized over a period of years, are they not, and never go into the capital account at all?

The Witness: Oh, I think they usually are carried into capital account until they are amortized.

Chairman Geiger: Well, but don't they carry them under amortization so much for amortization in those accounts?

The Witness: Well, as the amortization accrues, it is credited.

Chairman Geiger: All right.

Q. Assuming that the securities are to be sold at par, is there any such cost of financing?

A. Oh, yes.

Q. Explain that fully, Mr. Emery?

A. Well, the distribution of such securities is a real job, and it necessitates a considerable amount of expenditure.

Q. Please explain how it is done, where the expense comes in and so forth so that there will be no misunderstanding of your position?

A. Salesmen have to go out and peddle securities, just like other merchandise is disposed of. A concern of that kind always has a large overhead because of the great fluctuations in its business. It often gets hold of what in the merchandise trade are called "stickers" which it has to carry on its shelves due to——

Chairman Geiger: Is it necessary to go into the financing company and its organization?

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[fol. 490] Mr. Mullin: I think it is, your Honor, to cover this question of the cost of financing in this question.

Chairman Geiger: Oh, we recognize that you have to pay the bond seller something for his services in disposing of the bonds. The question probably is where that would go

and how you dispose of it, whether the cost of your re-establishing this business would be paid as such; then where it would probably go.

Mr. Mullin: If it appears as a matter of record that the Commission admits that there is this amount of expense and the cost of it ——

Chairman Geiger: We admit there is an amount.

Mr. Mullin: We wish to show that it is four per cent.

Chairman Geiger: How?

Mr. Mullin: We wish to show by the witness that it is four per cent and where that expenditure comes in. Now, if it is admitted that it is as much as four per cent, of course, we don't need to go further with this witness.

Commissioner Bricker: I think you better prove it.

Q. Go ahead.

A. To complete my answer, I will say due in many cases to the condition of the market.

Q. Do you have any data as to the actual costs of financing your gas companies and so forth, Mr. Emery?

A. I have, yes, sir.

Q. Will you refer to those and tell what the actual expense has been and how that is different from the case before the Commission, and so forth?

A. I have the record of first mortgage bonds of the Southern Natural Gas Corporation dated August, 1929, for which the Company received 88 and the public paid $97.50, 288

[fol. 491] which indicated a cost of financing in this case of $9.50 for each $88.00 in cash received by the company.

Q. State the amount of that issue?

A. $13,000,000.00.

Q. Is that the full amount of the securities of the corporation?

A. No, it was in the neighborhood of 60 per cent.

Q. 60 per cent?

A. Of the total money required.

Commissioner Klinger: Just a minute, Mr. Emery: Was that a holding company that did that financing—the parent company?

The Witness: No, that was financed in the open market.

The Memphis Natural Gas Company, first mortgage, dated August, 1928, produced to the company $90.00 for

each one hundred face value and was sold to the public for $99.50, being an indicated cost of financing of $9.50.

Q. What was the amount of that issue?

Mr. Tatem: Objection to this because it is not a matter of opinion; in fact, I think the witness stated that he did not deal in securities and since, he did not deal in securities and learn that, he is saying it from hearsay, in certain instances, certain companies were required under different conditions to pay a certain brokerage fee, and possibly by diligent search, we might find some instances in which a more favorable bargain was made with the broker. Except on cross-examination is it relevant to state the facts upon which an opinion is based, before really the witness has qualified to give the opinion?

Mr. Mullin: After the review that has been given for the past two days in the examination, of hundreds of all kinds of legal questions, the objection comes with rather poor grace it seems to me, to anything we offer.

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[fol. 492] Mr. Tatem: This is the first objection we have heard.

Mr. Mullin: In addition to that, it is entirely competent for the witness to support his testimony and give data on which it is based in part.

Mr. Tatem: We wish to especially speak of our own generosity in having sat for a long time without a single objection until now; I have never done it before in my life——

Chairman Geiger: I will say that.

Mr. Tatem: And practiced before Judge Geiger, who perhaps knows; and we have listened to leading questions and we have listened to argumentative replies and so forth, and I think we have done quite graciously.

Chairman Geiger: Well now, what is the point you wish to establish—that four per cent. is a fair amount?

Mr. Mullin: Yes, we wish to support the testimony.

Chairman Geiger: And you wish to support that by his stating specific cases in which it has cost the company much more than four per cent.?

Mr. Mullin: Well, for the purpose of tending to corroborate him, and showing a part of the business there——

Chairman Geiger: Well, he has said that he is not an expert upon bond matters.

Mr. Mullin: He said he did not take part in the actual financing himself, but he says he does know of these cases.

Commissioner Bricker: Are those natural gas companies?

Mr. Mullin: Yes, these are all natural gas companies.

The Witness: Yes, those were primarily pipe line companies.

Mr. Tatem: We are not going to reserve an exception if

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[fol. 493] you care to go ahead.

Mr. Mullin: They tend to support his position and support his opinion; we think that we are entitled to it.

Chairman Geiger: Let him run over without detail.

Mr. Matthews: The Dayton Power & Light Company, I can tell you, has paid something for money.

Chairman Geiger: Well, if it has, that is competent.

Q. Go ahead.

A. Southern Kansas Gas——

Commissioner Bricker: Just before we pass to that, I would like to have the cost of financing of the Dayton Power & Light business, of any of its extensions and betterments so far as financial set-up; will you have a witness here on that?

Mr. Matthews: Well, Mr. Howland is here, whether he has the data to produce offhand, I don't know.

Commissioner Bricker: Just keep that in mind when he comes to the witness stand, that we want it.

Q. All right, proceed, Mr. Emery?

A. Southern Kansas Gas Company, first mortgage bonds issued August 1st, 1927, produced to the company, $87.50 for each $100.00 face value, and were sold to the public for $98.50, an indicated cost of financing of $11.00 for each $87.50 secured by the company.

Q. How did the amount of the issue mentioned compare with the total amount of financing of the company?

A. I don't know in that case. This issue was $2,500,000.00, and constitutes a first mortgage. I should say that it might be between 50 and 60 per cent. of the total amount of money used.

Interstate Natural Gas Company, first mortgage bonds, dated July 1st, 1926, produced to the company $101.00 for each dollar of face value; were sold to the public for 105.

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[fol. 494] Q. That is the company that Mr. Lerch mentioned—his company?

A. Yes, and it is owned directly or indirectly by the Standard Oil Company of New Jersey.

Commissioner Bricker: Would you say that was the cost of financing that should enter into a rate base in that case?

A. Well, I should say that the four per cent. shown here would be a minimum. The distribution of the securities necessary to raise the remaining money would probably cost more than that.

Chairman Geiger: How is that?

The Witness: If they were distributed; they may have been held by the interests that built them.

Chairman Geiger: In that case, as I understand, you got more than par for the securities?

The Witness: The company got more than par.

Chairman Geiger: Well, then, it made profit upon distributing its securities?

The Witness: Yes.

Chairman Geiger: Well then, there wasn't any loss on it?

The Witness: Oh, no; but the cost of selling is the figure that I am aiming at, which was $4.00 for each $101.00 to the company.

Q. What was the amount of the issue in comparison with the entire amount of the financing?

A. The amount of the issue was $10,500,000.00.

Q. What is the amount of the total capitalization of the company?

A. Approximately twice that; I don't know just the figure.

Q. All right, proceed with the next one.

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[fol. 495] Chairman Geiger: Well, wait, it is our understanding that where a bond of that company was sold for more than par and that went into the treasury that it cost in addition in some way $4.00 to sell the $100.00 of that.

Commissioner Klinger: Well, the company realized less.

Mr. Mullin: That is only half of the total financing of the company.

Mr. Matthews: Cost that much to sell it.

Chairman Geiger: If he turned in the cost only, he wouldn't make as much money? All right.

The Witness: This was an extremely gilt edge security.

Chairman Geiger: I know it was, and I don't see how the would charge them up with $4.00.

Mr. Matthews: Yes, the company would not get all the money they could sell the securities for.

Chairman Geiger: You mean if the company had not so paid $4.00 less for something, that they would have sold for $105.00?

Mr. Matthews: Sure.

Chairman Geiger: Instead of 101?

Mr. Matthews: Sure.

Commissioner Bricker: Then the company might have declared a dividend on this premium?

Mr. Matthews: Possibly.

The Witness: Southwestern Utilities Corporation first collateral bond dated June 1st, 1923, price realized to the company, $87.00 for each $100.00 face value; price paid by the public, $98.50, an indicated cost of financing of $11.50

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[fol. 496] for each $87.00 received by the company.

Q. What is the amount of that issue?

A. Two million dollars.

Q. Do you know how it compared with the total amount of finances of the company?

A. I do not. Northwestern Utilities first mortgage bonds, dated June 1st, 1923, the company received $80.00 for each $100.00 face value; the public paid $100.00, the difference, which is the indicated cost of financing was $20.00 for each $80.00 raised.

Chairman Geiger: I think you have gone far enough with that—with permission for him to submit a list further.

The Witness: I would like to complete this particular one, I would like to add that——

Chairman Geiger: All right.

The Witness: That this was a somewhat extraordinary case of a complete natural gas company that was built in Alberta.

Q. And under the direction of the court you may give the rest?

A. Yes.

Q. What is your judgment as to the amount of four per cent.——

Chairman Geiger: Well, he may put that Alberta one in, too.

Q. All right, finish the Alberta statement.

Chairman Geiger: No, he wishes to put that in.

The Witness: I thought the instructions were to submit this.

Chairman Geiger: Well, you can put it in now if you desire to call especial attention to——

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[fol. 497] Q. Proceed with the Alberta?

A. Well, I have finished that.

Q. What do you say as to the amount of four per cent. which is allowed for cost of financing in this case?

A. I think that the amount of money derived as the cost of financing by the use of four per cent. is the minimum allowance for this expense.

Q. In your judgment could it be done for so small an amount as that named in here?

A. I think it could be done for such a small amount only under the most favorable circumstances.

Q. Under ordinary circumstances, compared to average conditions, what would you think it would probably amount to as a minimum in the best of your judgment?

A. If it were a new independent company, it might go as high as twelve per cent., perhaps fifteen.

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[fol. 498] Q. Mr. Emery, when you were on the stand yesterday, I understood one of your answers to a question asked you by the Commission, as I recall it, to be in substance that in your judgment the cost of financing on that proposition—the stenographer does not have with him the notes showing what your testimony really was on the point—will you explain what the intent of your answer was in that connection so that there may be no misunderstanding.

A. I don't think you interpret my answer quite correctly; I believe it referred to that part of the cost of

financing applicable to the bonds, and I in giving the answer, had in mind the usual accounting procedure for amortization under which such charges are set up assets and amortized as and when they can be amortized.

Q. Set up as a part of the capital?

A. Yes.

Chairman Geiger: Well, are they a part of the company; you would not amortize capital, would you?

The Witness: Oh, yes.

Commissioner Geiger: You mean capital against which stock is issued—capital stock? All right, I get you.

The Witness: In this particular item, the bonds themselves would mature and have to be refunded, so that the cost of financing——

Chairman Geiger: I thought you were talking about the discount on the bonds. All right, go ahead.

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[fol. 499] Q. What is your judgment then as to whether or not the cost of financing as you were discussing it in the answer referred to should be included in the valuation of the property?

A. Oh, it should be by all means.

[fol. 500] (3) Paving Over Mains

[fol. 501] F. H. Lerch, Jr., testified:

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[fol. 502] Q. That is what I mean. Before taking up the summary of your valuation, Mr. Lerch, you said that you had appraised the property or estimated the reproduction cost on the basis of existing conditions. What did you do with, for instance, paving in the streets where paving exists over the lines of the company?

A. We made a complete inventory of the extent and the kind of pavement over the mains and services of the company, and have included in our cost of excavation the cost of cutting through that paving and in our cost of backfilling the cost of restoring the pavement.

Q. In other words, it is just a part, as you have considered it, of making the trenches and replacing the ground in the condition in which you found it in the first place?

A. Exactly, that is the way we have treated it here.

Q. If you will turn to your report at Page 14—well, before you get to that, let me ask you a few general questions that will aid in this direction: In your judgment, could this plant be reproduced at the time adopted as of the date certain for less than the amount you have estimated it?

A. I think not, no, sir.

Q. Are the labor and material prices which you used as low as could be obtained?

A. I think they are, yes, sir.

Q. Is the performance which you use as great as could

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[fol. 503] be obtained—the rate of performance?

A. I think the rate of performance is what would be accomplished in rebuilding this plant.

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[fol. 504] Chairman Geiger: Now, one other question, the last I want to ask, just for my information. Beginning on Page 27 and running to Page 24, you have set out different items; now, what does that cover? Pipe—building of the line?

The Witness: Yes, that covers the entire cost of the pipe in place.

Commissioner Klinger: That is the invoice?

The Witness: Sir?

Commissioner Klinger: That is the invoice?

The Witness: No, sir.

Mr. Mullin: Inventory.

The Witness: No, sir, that is the pipe installed, this is the pipe, plus the freight, plus the hauling of it around the town, the stringing of it over the ditch, the digging of the ditch, the laying of the pipe and the backfill.

Commissioner Klinger: Where did you get that, from the books of the company?

The Witness: No, that is from built-up.

Commissioner Klinger: That is built up?

The Witness: That is built up price.

Chairman Geiger: And there your total is $474,131.00; that represents the distribution without, I believe, the meter?

The Witness: That is just the pipe itself, yes, sir.

Commissioner Klinger: You do not attempt to check out

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[fol. 505] your values there with the books of the company as to actual cost?

The Witness: No, sir, except as to units, not as to total, you understand.

Mr. Matthews: What you have just spoken of is the mains in the street, isn't it, the service pipes are in there on the following page.

The Witness: Yes.

Chairman Geiger: Yes, the mains in the street.

Mr. Matthews: Well, the service pipes and the services to the curb come on the pages that you just referred to.

The Witness: They come next.

Chairman Geiger: Well, the only thing I want to get before you, you have here the paved cost for the cutting through and replacing pavement, depending upon the kind of pavement.

Mr. Matthews: Yes.

The Witness: Yes, sir.

Chairman Geiger: Which are here designated by symbols.

The Witness: That is right.

Chairman Geiger: But you didn't show us yet anything about how much of this cost that aggregates the $474,000.00 is due to that cutting of the pavement; have you got a separate workout of that?

The Witness: It is not in this report. The detail of the built-up prices would show that.

Chairman Geiger: The what?

The Witness: The detail of the built-up prices would show how much was included.

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[fol. 506] Chairman Geiger: Well, have you got that anywhere there?

The Witness: Well, it is not in form to be presented but it can be gotten in form and turned in.

Chairman Geiger: I understand the law to be this—and yet I am not certain about it, and I may state it incorrectly: That in taking into account the cost of reproduction of a plant where paving is involved and must be removed and relaid, that you are not entitled to that cost if the pavement did not exist at the time you originally laid the pipe; isn't that right? We could not tell from this.

We must go on the assumption that this pavement was in when you originally laid the pipe and you are going to cut into it again, dig a trench, fill your trench up in your street and re-lay and connect up the pavement as it was before.

The Witness: That is right.

Chairman Geiger: Is that right?

The Witness: That is the assumption on which this testimony is made, that the pipe is installed in the place that it now is under the conditions as they now exist. In other words, to put the pipe on this street out here would require the cutting through of the pavement.

Chairman Geiger: I know.

The Witness: In this instance.

Chairman Geiger: But if the pipe were originally laid when there was no paving out there, and the pavement has been put in afterwards, you have to cut that paving theoretically, lay your pipe, replace your pavement; you are not entitled to it.

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[fol. 507] The Witness: I see your point of distinction, which you are making. If that assumption is made, some of this paving would have to be eliminated, but I just want to make it clear that that is not the assumption that this report is based on.

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[fol. 508] Q. Well, did you visit these different towns during the preparing of your report or before you prepared it?

A. I didn't visit it before; I visited it after it was in the course of preparation, before it was finished—I visited the principal towns; not all.

Q. Did you make any check of the character of pavement that there was on various streets in the several villages or cities as shown by the report that was then under process of compilation?

A. We made a very complete inventory of all of the paving of every type that we found in all of these towns, over the pipe lines.

Q. That is as of the date of June 30, 1929?

A. That was made subsequent to that time, but the maps were marked to indicate the paving and it was computed as of June 30th.

Chairman Geiger: Now, assuming that there was a paving over the pipe line and you knew the location of the pipe

line, then you estimated how much it would cost to cut through that paving and lay the pipe, refill and replace the foundation and the paving; is that the way you get at that?

The Witness: Yes, sir.

Chairman Geiger: Well now, how do you know in looking at the type of the payment which was not then removed, what sort of foundation was under it?

The Witness: We went out and made inspections of the type of paving and consulted the records.

Chairman Geiger: Did not dig it up?

The Witness: In some instances, it was opened and in other instances, it was tested; we also had the services of the city engineer who assisted us in describing it.

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[fol. 509] Chairman Geiger: In estimating the width of the trench and so forth that had a great deal to do with the amount of cost of digging the trench and refilling and repaving it?

The Witness: That is right.

Chairman Geiger: What sort of width did you have to your repavement; the repaving the same width as the necessary trench?

The Witness: The same width as the trench. We considered that the paving was cut and replaced the same width as the trench as of the same character as our inventory showed it to be.

Chairman Geiger: And would you depreciate some of that paving?

The Witness: We have depreciated the entire construction account according to our deterioration.

Chairman Geiger: But not according to the specific deterioration of the paving in the different places?

The Witness: No, sir, we based the deterioration upon the pipe itself and the cost of installing.

Chairman Geiger: But the paving might have been considerably depreciated by wear and tear, more than the pipe?

The Witness: Yes, we didn't attempt to measure any relation between those two factors.

Commissioner Bricker: Do you know how much paving actually was cut in the laying of these pipe lines?

The Witness: No, sir.

Commissioner Bricker: Do you know whether there was any or not?

The Witness: Yes, there was some cut. We found some
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[fol. 510] but that was probably not all of it.

Commissioner Bricker: Will the company have witnesses who will be able to produce that?

Mr. Matthews: We will, Your Honor.

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[fol. 511] By Mr. Tatem:

Q. Mr. Lerch, looking at Page 30, which carries Account 234, distribution line equipment, Tippecanoe City, there are two columns of symbols; what are the relations of those two columns?

A. The first is the top surface or type of top dressing and the second is the base on which that dressing is laid. For instance, you will notice the two inch pipe is laid with a brick top surface, that is a brick street, as you ordinarily look at it, but it is laid on a concrete base six inches thick with a sand cushion between the brick and the base, of one inch of sand.

Q. And those have reference to the character of the base and the top surface on June 30, 1929?

A. Yes.

Q. If there had been any pavement laid after that or any different top surfacing applied, it would not show here?

A. No, it is not the intention to show here except as of June 30.

Q. Have you used these symbols in relation to the top surface and base in Tippecanoe City when you were there?

A. Yes, that is where that information came from, from an inspection of the paving in Tippecanoe City.

Q. If you were informed correctly that this Gt, gravel-
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[fol. 512] tarvia top surface had been applied at all places where you used that symbol here after July 1st, 1929, how would you account for an error of that in the report?

A. That Gt. means gravel treated with oil, something of that kind, not necessarily Tarvia; it is just a street that has been treated to lay the dust, but I would say that if that treating was done afterwards, then the allowance for treating would be in excess; would be an excess of value.

Chairman Geiger: Now, may I ask a question there, Mr. Tatem?

Mr. Tatem: Yes.

Chairman Geiger: Excuse me for being so persistent.

Mr. Taten: Go right ahead.

Chairman Geiger: In the case of the Columbus Gas Company, 17 Federal, second edition, 630, decided by District Judge Hough, the following appears:

The company contends that, under the reproduction new theory, the cost of cutting and replacing all pavement, that, at the time of the appraisement, which had been constructed over the mains in the natural gas system, properly enter into the reproduction cost new. On the other hand, the city claims that only such pavement as was cut at the time of original installation should now be carried in that value. The Master's finding is in accord with the city's contention, and is correct. Rate-making bodies have been confronted with this question, and the weight of these holdings is so strong that the exclusion of all costs for paving cut and replacing, other than that cut and replaced at the time of the original installation has become the almost universal rule.

Assuming that that is the correct principle, and it then becomes necessary for the Commission to exclude that paving which did not exist at the time of the original installation of the pipe, is there any means by which we can deter-

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[fol. 513] mine the amount of that construction, from anything that you have?

The Witness: Not in this report, and nothing has been submitted so far.

Chairman Geiger: That is all put in together?

The Witness: It is all put in together.

Mr. Matthews: I think from Mr. Greene——

The Witness: Mr. Greene will testify as to the paving units and inventory but not as to the amount.

Commissioner Klinger: I think Judge Matthews says he will have a witness.

Mr. Matthews: We will have a witness giving the amount of paving cut, but we do not want you to lay down that rule that Judge Hough laid down until you have heard us.

Chairman Geiger: We only say that in the event we conclude that this is the correct statement of the law.

Mr. Matthews: These Federal Judges make mistakes sometimes.

Mr. Mullin: We understand that the Commission would like to have the fact in the record which it might adopt in the event that it followed that case.

Chairman Geiger: Yes, how much we should value for the value of your repaving.

The Witness: Mr. Mullin, Mr. Greene won't necessarily be in a position to answer that.

Mr. Mullin: I understand, but I am getting at the position of the Commission.

By Mr. Tatem:

Q. Mr. Lerch, in connection with the question asked you by the Commissioner, are there any other conditions that arise from the development of cities, particularly having 219 [fol. 514] reference to the burying in the street of the equipment of other utilities that together with the paving that may have been placed on the surface when the original installation was made that would add to the cost under your theory of reproduction as for instance in using a machine equipment for trench digging, if by reason of development in a city, there are new lines, utility conduits and wires and other equipment of that sort laid in the city after the original installation of natural gas was put in, do you find your reproduction cost increased proportionately in a very large city as for instance on Broadway in New York, where not only these conditions, but perhaps subways are to be encounte-d at certain points when there would be a very great difference in the cost of reproduction with those added facilities, together with the pavement to be taken into consideration, would there not?

The Witness: There is no question about it.

By Mr. Tatem:

Q. Would you say that if a company laid a natural gas main in the street when there were no other appliances there, and in later years there were developments which made it extremely difficult for them to re-open and re-lay, that your reconstruction cost should be based on the difficulties to be encountered at the time you are making your later appraisement?

Mr. Matthews: Mr. Tatem, isn't that a question of law under the Ohio statutes?

Mr. Tatem: Well, we are considering that Mr. Lerch along that line has made appraisement of this pipe and we would like to know whether it is the custom of engineers to include those matters in estimating reproduction cost.

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[fol. 515] The Witness. It is. The reproduction cost is based upon the conditions as they are found at the time of the reproduction investigation.

Mr. Tatem: And yet in setting up that added value for the purpose of establishing a rate on the basis of it——

Mr. Mullin: He didn't say in connection with a rate.

Mr. Tatem: Well, I will let that stand.

Q. You are attaching to the whole matter a species of unearned increment as to which you might in your own mind, have some question?

A. There is no question in my mind, but I wouldn't say that it was an unearned increment. I also would like to say that in making these reports and making reports of this kind for the Dayton Power & Light, we have followed exactly the same plan that we would follow and the same factors were taken into account, if the report was to be made for any other purpose, for the purchase, the actual purchase or sale or any other general purpose including the rate purpose. I see nothing in this report which would indicate that we had given weight to any element that was not properly an element in the determination of reproduction cost at this time.

Q. How do you satisfy yourself that the company should be entitled to a rate based on an increased reproduction cost arising from the fact that the public in other cases has put in utilities in the street and made it inconvenient to open it up again without a much greater cost?

A. Well, I have not considered that question that I have to satisfy myself on. I think that a reproduction cost should be, you find the plant; otherwise, it could not be a reproduction cost. It is some other cost. I think that a re-

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[fol. 516] production cost of the property is about as fair a method as you can follow to get the present value of the physical property, and if the other elements of value can be

considered on a reproduction basis, then it is a fair method for determining the total value.

Mr. Mullin: I clarify the company's position directly on that by saying it is a part of our contention that we are at a loss, you might say, because we have to reproduce on the basis of the use of ditching machines which lessens the reproduction cost very much. On the other hand if the paving is there and because of that the cost of reproduction is higher, it is no different than from the circumstances which weighed upon the conditions that exist are just about as broad as they are long.

Q. To make a case for the purpose of developing this particular point: There were a street as in Broadway, New York, that in years past had nothing under the surface to interfere with economical laying of natural gas mains and there was a certain reconstruction value at the time it was made or soon after, before new appliances were put in the street, and then there came along all of these modern features such as public utilities have promoted in later years including subways and other constructions of that type and the whole matter of reconstruction then became enormously great in proportion to the original condition; would you say that the company is fixing a rate, not having to actually do that reconstruction, would be entitled to capitalize it and have the public pay them a rate on an increased cost to which they did not contribute at all?

A. I don't see why they shouldn't estimate their reproduction cost upon the basis that they find the reproduction would have to be carried on, and that that is a fair measure

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[fol. 517] of the value of that property.

Mr. Mullin: Have you had any experience with New York streets yourself?

The Witness: We have. Yes, sir, I have and we have in the office and we have a report in the office—I have nothing to do with it, but I am familiar with it through its being a utility in the office—a report made on a steam company which unquestionably was laid after—part of it might have been laid under a condition other than now existed—but we made our report naturally upon conditions as we found them at the time of the investigation.

Mr. Mullin: Approximately how much was that a foot pipe if you remember—I mean a foot?

The Witness: Well, it was a type of pipe that was expensive pipe, but the total was well over $100.00 a foot in some parts of the system.

Mr. Mullin: How many consumers would they have per mile? Pardon me—to help clarify that situation?

The Witness: Well, that might run through apartment house district, they might run several hundred consumers through the middle of the apartment house district.

Mr. Mullin: And in that place in Park Avenue where it has about 5000 consumers in a mile?

The Witness: I understand they would have that much in a case sometimes where the individual consumers have meters.

Mr. Mullin: Pardon me, I wanted to just clarify that.

Chairman Geiger: Let us follow that just a line or two further. The appraisement of which you speak was made for the purpose of fixing a rate?

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[fol. 518] The Witness: It was made, I believe, for the purpose of transfer of the property.

Chairman Geiger: From a subsidiary company to another?

The Witness: No, I believe it was a case of outright acquisition of the property, all I know—just a minute—I am not familiar with all the purposes to which the report was to be made. All I wanted to illustrate was the fact that the report was made for the company's——

Chairman Geiger: All right now. Again, do I understand you to have said that you would make the same sort of appraisement if instead of being engaged to make an appraisal for rate-making purposes, you would have been engaged to make an appraisal for either buying or selling?

The Witness: Yes, sir.

Mr. Mullin: He says as to physical property.

Chairman Geiger: What is that?

Mr. Mullin: He says in connection with physical properties.

The Witness: Yes, sir.

Chairman Geiger: In connection with this property, including tangible and intangible?

The Witness: We would make the reproduction cost——

Chairman Geiger: Well, wait, just answer the question; did I understand you to say a moment ago that you would make it the same way?

The Witness: Yes, sir.

Chairman Geiger: And you would include in it either if you represented the purchaser or the seller—you would include in it going concern value and so forth?

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[fol. 519] The Witness: We would include in it all of the elements of intangible value that we have mentioned here or make some allowance for them in addition to going concern*ing* value.

Chairman Geiger: Now, do you mean to tell me that if two corporations are in the market, one to sell and the other to buy a given utility that they would go out and send an engineer to produce data such as this on reconstruction?

The Witness: Absolutely.

Chairman Geiger: In order to determine what they are going to pay for the property?

The Witness: Absolutely as one of the elements that they are going to determine. I have done exactly that thing myself. The only difference is that we might not go into the tremendous detail.

Chairman Geiger: How?

The Witness: The only difference is, he might not go into the tremendous detail, but we could not overlook one of the items that we have taken into account here.

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[fol. 520] Q. You were also asked at the former hearing something as to the amount of the cost of paving and so forth; was any separate determination made or valuation made of paving? That is, did you include anything in your appraisal for paving as such?

A. No, sir, we included the paving as an element of cost of ditching, and cost of back-filling.

Q. That is, you took the conditions as they existed with the pavement in place, and determined the reproduction cost, which would necessitate the cutting through and relaying of such pavement as exists over the main, did you not?

A. Yes, sir.

Q. Have you since then made an appraisal of what the reproduction cost would be if no pavement existed?

A. We have not made a complete reproduction cost. We have made an estimate of what is included in here on account of the element of paving being included in the ditching and back filling.

Q. Well, you determined that by deducting from—go ahead.

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[fol. 521] A. That is determined by deducting from the unit prices of ditching and back filling the amount included for paving and substituting in place thereof the cost of ditching through the equivalent amount of earth which is actually existing as paving, and the cost of back filling the ditch from the surface to the bottom of the pipe.

Q. What do you find the difference to be between the reproduction cost with the paving and what it would be if no paving existed in the properties?

A. I will give you that. The reproduction cost as of June 30 new would be $219,460.00 less than appears on the summary in our valuation, Exhibit No. 2.

Q. From the new basis?

A. From the new basis.

Q. If no pavement existed?

A. If no pavement existed.

Q. What are the figures——

A. The deteriorated basis would be less, $171,674.00. That would be the second column in the summary of the valuation. That includes general overheads.

Mr. Rush: Mr. Mullin, may I interrupt just a minute and ask where those figures appear on this sheet?

Mr. Mullin: They do not appear in the exhibit. This is information given pursuant to the request of the Commission at the prior hearing.

Mr. Rush: Am I to understand that some of these figures are now being altered?

Mr. Mullin: Not at all; not at all. As we understood it, Mr. Commissioner Bricker asked to have information as to how much the paving added to the cost of reproduction new, and depreciated, so that if the Commission concluded

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[fol. 522] that the cost of it should be excluded it would have the figures before it substantially—possibly it was one of the other Commissioners.

Commissioner Bricker: I asked that we be given the figure on the actual amount of paving which was cut and replaced at the time of the construction.

Mr. Mullin: That is also a request that has been made. Possibly it was one of the other Commissioners that made the request. It was in the record.

Commissioner Bricker: Those were the figures? I wondered if it was possible to get them at all.

The Witness: Well, those would be in addition to—would be aded back after these were taken out.

Mr. Mullin: I infer from information, that they cannot determine what that was; they cannot determine how much paving was cut and relaid by the company as a matter of fact in the construction and the extension of its plant.

Commissioner Bricker: Well, do you know whether there was actually any at the time the plant was constructed?

Mr. Mullin: I believe there was some but we do not know how much. I want to verify that because I am not sure. (After a conference) I am informed by the engineers that there was some cut, but we do not know how much.

Commissioner Bricker: What do you mean, Mr. Lerch, by the depreciated value of the cutting of the paving?

The Witness: Well, what we did in fixing the depreciated or deteriorated value of the pipe lines was to include whatever had been included in the way of cost of cutting and replacing pavement as one of the unit costs to be deteriorated in the same percentage that the pipe was deteriorated.

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[fol. 523] Q. You carried that through all of your labor items?

A. Oh, yes, just the same as though it were filled in, deteriorated. We did not make any distinction.

Mr. Mullin: For instance the trench—it is one of the portions of reproduction cost depreciated—is not there at all; there is no trench and there has not been since that was filled up, but that is the method of obtaining reproduction cost in the cost of the plant as it is.

Commissioner Bricker: Have the solicitors any information as to the actual amount of paving which was cut in your respective towns?

Mr. Keyt: We are obtaining that from our city engineers. Mr. Montgomery has something on that.

Mr. Mullin: Have you any idea what it amounts to?

Mr. Keyt: We have not computed it yet, but I think we will.

Mr. Mullin: May we withdraw, Mr. Lerch, a moment, and put on a witness by whom we want to prove a fact about which we want to ask him later?

Chairman Geiger: Do I understand Mr. Lerch, assuming that no paving had been cut at the time of the original installation of your gas pipes in these various cities, then the amount of your reproduction cost as it was depreciated would be $171,674.00 less?

The Witness: Yes and no, Mr. Geiger, what I said was this $171,000 should be deducted if the valuation were to be considered as not laid through paving of any kind, regardless of whether there had been any cut in the first place or not, you see.

Chairman Geiger: That is you say that line is being absolutely dug in to virgin soil without a street paving?

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[fol. 524] The Witness: That is right.

Chairman Geiger: To be cut into or relaid?

The Witness: If you take that much out that is the condition of the reproduction.

Commissioner Bricker: If there were no paving to be cut at all now?

The Witness: Yes, now, and if there is any paving and it has been cut, which can be shown to have been cut, then that must be added in to the other——

Mr. Mullin: That is the depreciated?

The Witness: Yes, he said depreciated.

Mr. Rush: Is the $219,416.00 the amount before it was depreciated?

The Witness: Yes, that is the new value including overheads.

[fol. 525] JOHN F. GREENE testified:

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[fol. 526] Q. What is your name?

A. My name is Greene, John F. Green, G-r-e-e-n-e.

Q. Where do you live, Mr. Greene?

A. In New Orleans, Louisiana.

Q. How long have you lived there?

A. For three and a half years.

Q. Where did you live before you went to New Orleans?

A. In St. Paul, Minnesota.

Q. Where were you educated, Mr. Greene?

A. I was educated in Boston; I am a graduate engineer with two years of post graduate work at the Massachusetts Institute of Technology.

Q. And you also graduated from another college there, did you?

A. Yes, sir.

Q. What was the other college?

A. Boston College.

Q. How long ago did you graduate from Boston Tech or Massachusetts Tech—is the same—Boston Tech and Massachusetts Tech is the same?

A. Yes. I didn't graduate from Massachusetts Institute of Technology; I took two years of post graduate work in civil engineering after I had graduated from college in civil engineering.

Q. When was that?

A. I was graduated in 1905, but I took the two years immediately after that; that is, I left Massachusetts Institute of Technology in 1907.

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[fol. 527] Q. And you have been practicing your profession ever since then?

A. Yes.

Q. What is your present employment?

A. I am in the employ of Ford, Bacon & Davis, Engineers, as construction engineer.

Q. How long have you been with Ford, Bacon & Davis?

A. For three and a half years.

Q. What experience have you had in public works, either in the employ of contractors or in the employ of municipalities and so on?

A. I have been employed since 1908 for the period of fourteen years, as engineer in charge of the construction of roads and bridges for municipalities, and for eight years in charge of the same kind of work outside of municipalities.

Q. What cities have you served?

A. I have been employed in Spokane, Washington, in Calgary, Alberta and in St. Paul.

Q. St. Paul, Minnesota?

A. St. Paul, Minnesota.

Q. In these towns, have you had to do with street paving and that sort of work?

A. Yes.

Q. So you are familiar with street paving, how it should be done and all of that sort of thing, are you?

A. Yes.

Q. In connection with this case did you make any examinations and report of street paving over gas mains and gas service pipe in the towns which are concerned in this hearing?

A. Yes.

Q. Tell in your own way what you did, Mr. Greene?

A. Is it all right before I do that, to add two items which you did not ask in regard to the experience?

Q. Go ahead and answer?

A. There were two large jobs which it may be well to

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[fol. 528] refer to. In the last seven years, on one of these jobs I was engaged as engineer in charge of the design and also the construction of the bridge, of a concrete arch bridge in St. Paul which cost one million eight hundred thousand dollars. In New Orleans, I was in charge of a road project which was 15 miles long, and which included five miles of concrete bridge, the total cost of which was over four million dollars. That is all. Now, shall I go on and answer the other question?

Q. Go ahead and tell what you did in these towns? Which of these towns—which of the eight towns involved in this did you find paving in in this proceeding?

A. All of the towns.

Q. Well, was there any paving in Wilberforce?

A. Yes, there was some; of course, it is a low grade of paving; it is not high-grade paving.

Q. All right, now go ahead and tell what you did?

A. I rode over the pavement in each of these towns, the pavement which is included in the inventory as lying over the mains; I examined that pavement and recorded the kind; made borings to ascertain the details of the pave-

ment, and obtained the confirmation of those details from the municipal engineers in each of the towns where that information was obtainable. After acquiring this information, I prepared the estimates of the cost of removing the pavement and of putting the pavement back.

Q. Did you drive over each street in each one of these towns and examine the pavement?

A. I rode over each street in each town and examined

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[fol. 529] the pavement as indicated on this inventory.

Q. Who measured up this paving; was it done under your supervision?

A. It was done under my supervision.

Q. And to whom did you report of the result of your examinations; to whom did you give that data that you obtained?

A. To our firm.

Q. To Mr. Lerch?

A. To Mr. Lerch.

Q. That is Mr. F. H. Lerch who testified here?

A. Yes, sir.

Q. Yes. Have you examined the document that is in here as Exhibit Number 2; you have seen it, haven't you?

A. Yes.

Q. I wish you would examine these pages in here in Exhibit Number 2, star-ing with Page 27 and go through it so far as the paving is concerned, which I believe takes to Page 40, and see whether that is true and correct, both as to quantities and price and everything else connected and shown on those pages.

A. I don't believe that I am prepared to testify to all of that. I prepared the cost only of the removal and putting back of the pavement. The unit costs in here include other items, the installation of the pipe and the things of that sort.

Q. Well then, you did not make the calculations in these pages as I understand, of the figure of the cost, did you?

A. I did not prepare the entire unit cost; I prepared that part of it that refers only to pavement.

Q. Only to paving?

A. Yes.

Q. Well now, the quantities, the length of service pipe and of gas main that were under paving as they are given

on these pages I have called your attention to; is that correct?

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[fol. 530] A. Yes, sir.

Q. What width of ditch did you take into account in making up this data?

A. The width of the excavation averaged from 18 inches to one foot ten and depending upon the diameter of the pipe.

Q. What was the largest pipe that you accounted for in this way?

A. Eight inches.

Q. Eight inches, and the smallest is what?

A. Inch and a half.

Q. Inch and a half; that runs from eight inches to an inch and a half and the width of the trench averaged from eighteen inches to 22 inches, according to the size of the pipe?

A. Yes, sir.

Q. And this Exhibit 2 gives the size of the pipe and the number of lineal feet of the size of the difference pipes, does it not?

A. Yes, sir.

Q. And those are all correct?

A. Yes, sir.

Commissioner Bricker: Mr. Greene, your estimates deal only with the actual paving; didn't have anything to do with the excavation of the dirt under the pavement and the refill?

The Witness: No, sir.

Commissioner Bricker: You just dealt with that portion of the construction which might be called paving or superimposed upon the soil?

The Witness: Yes, sir.

Q. I notice that one size here, three-quarters of an inch; that would not make any difference in the width of the trench?

A. No, whenever the service main is referred to, the ditch was only one foot.

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[fol. 531] Q. The service, you mean that was the pipe leading from the pipe out into the street, the pipe up to the curb?

A. From their curb box to the main.

Commissioner Bricker: You had nothing to do at all with the depth of the trench or the width of it except insofar as it dealt with the pavement then?

The Witness: No, sir.

Commissioner Bricker: What was the width of the service trench from the gas main into the curb?

The Witness: One foot.

Commissioner Bricker: One foot. Now, the work which you did shows the pipe which is under paving, also that which has no paving above it?

The Witness: I didn't have anything to do with the part that refers to the pipe with no paving over it, and I offer no evidence regarding that.

Commissioner Bricker: Your mission was to learn what pipe was under paving, the character of the paving, and how much there was of all of it and calculate out the square feet of that pavement; is that right?

The Witness: Yes, sir, and the cost.

Commissioner Bricker: And the cost of it?

The Witness: Yes, sir.

Commissioner Bricker: And that you did?

The Witness: Yes, sir.

Commissioner Bricker: Now, this cost of that paving is all shown where, on your work sheets?

The Witness: Yes, sir.

Mr. Matthews: May it please the Commission, you asked

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[fol. 532] for these figures as to the cost of cutting and putting this paving back. We have got it all in the work sheets; it is not comprised in a separate item in Exhibit 2, and that will have to be worked up by Ford, Bacon & Davis' office and referred and sent here to the Commission and we will furnish copies to the solicitors and they can cross-examine if they wish to on it.

Commissioner Bricker: That is all very well, but my question didn't confuse you; what I wanted was whether or not Mr. Greene had taken into consideration all the paving as it is today, or whether he had any information in regard to what paving was actually there when the pipes were really laid. Now, have you a witness who will furnish that?

Mr. Matthews: Mr. Greene can.

Q. You took into account the paving that is there now?

A. The inventory which we have submitted is that found as of June, 1929—June 30th.

Commissioner Bricker: You do not know, Mr. Green, how much paving was actually cut by these companies when the lines were installed and have no information or other evidence regarding that at all, you did not check on the municipal records to see whether the paving was in at the time the trenches were dug and the mains were put in.

The Witness: I have no information on that.

Commissioner Bricker: Has the company any witness who has that data available.

Mr. Mullin: I think not.

Mr. Matthews: I am afraid not. If we can find any data of that kind, we will give it to you, but I am afraid we

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[fol. 533] could not get it.

Commissioner Bricker: It would have to be secured, I suppose, from the company records in the city office.

Mr. Matthews: Well, unless the city records are a whole lot better than the city work records with which I am familiar I am afraid we could not get a good deal of it.

Commissioner Bricker: You said, Judge, you had examined the cases in Ohio and you thought you were entitled to the cost of cutting and replacing pavement as it is today.

Mr. Matthews: Yes, sir.

Commissioner Bricker: Now, there is a distinct line of cases on the other side.

Mr. Matthews: Yes, sir, there are two leading cases against us, but I think—we think we can show you that they don't apply in Ohio. Now, I mean——

Commissioner Bricker: That is one of the points that we want briefed particularly, and it won't do us any good to brief it unless we have the data to determine what the other cost would be if we follow the other line of cases and that was the reason that I asked particularly about the paving the other day.

Mr. Matthews: Well, now, the best we can say about that is that we will see if we can get the data as to what paving was actually cut by the company in laying pipes, that you would like to know.

Commissioner Bricker: That is what we would like.

Mr. Matthews: And if we can find that, we will furnish it to you and we may even go and talk with counsel on the other side and see if we can find it out.

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[fol. 534] Mr. Browning: And I do think, too, we ought to have from Mr. Greene, the cost of this paving; I think that would be a very practical——

Commissioner Bricker: In other words, the data that he had for his work sheets?

Mr. Browning: If he will sign them and submit it.

Commissioner Bricker: Judge Matthews says he will do that.

The Witness: He is prepared to do that.

Mr. Browning: We are prepared to examine him on that.

Commissioner Bricker: I think that will be worked out if Mr. Green will submit that to the Commission.

Mr. Matthews: We will get it, but it will take some little time to work it up—but we will get it.

Q. I want to call your attention—you spoke about inch and a half pipe being the smallest pipe shown under paving—I see on Page 33 of Exhibit 2, there is some three-quarter inch pipe in there, is that right?

A. Yes, sir.

Q. There is not very much of the three-quarter, however.

Mr. Pfarrer: Mr. Greene, the position of counsel so I understand, is that they desired to cross-examine on certain points, and Mr. Greene is prepared to stand cross-examination in that.

Mr. Browning: No, I said if Mr. Greene would submit his cost sheets for that, we will waive cross-examination.

Commissioner Bricker: There may be no occasion for calling Mr. Greene back.

Mr. Klapp: That is, how much of this, in the actual cost

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[fol. 535] reflects the cost of cutting the pavement—just his figures on that.

Mr. Browning: We will waive that.

Commissioner Bricker: If that is satisfactory, that is all.

Mr. Klapp: I have a question I would like to get in the record.

Cross-examination.

By Mr. Klapp:

Q. Mr. Greene, have you ever done any contracting—any paving contracting on your own hook, we might say?

A. That is as a contractor?

Q. Yes, as a contractor?

A. No.

Q. You never have. Have you ever prepared estimates for bids for other contractors as an estimating engineer?

A. I have prepared such bids innumerable times.

Q. And then I would like to ask this question then: The figures that you are going to submit as the cost of cutting and replacing this pavement—would that be the figures that you would submit if you were bidding on the job for the contractor, that is, as his engineer, of course, preparing his bid?

A. I don't believe that I would want to work at the prices that I have estimated. They are too low.

Q. That is, you would probably estimate them higher?

A. They are too low by considerable.

Mr. Matthews: You would want to add something for profit on top of the figures you have submitted?

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[fol. 536] The Witness: Yes.

Cross-examination.

By Mr. Browning:

Q. I will ask you one question, Mr. Greene: You examined the paving in Washington Court House, did you not?

A. Yes.

Q. And found that there was probably 31 miles of paving, more or less brick and asphalt and such as that?

A. Yes.

Q. And observing, or rather from your memory of or knowledge of the condition of that paving, would you say that that paving was in place 30 years ago?

A. I wouldn't be able to say that.

Q. You wouldn't have any opinion on that whatever?

A. No.

Mr. Browning: That is all.

Recross-examination.

By Mr. Klapp.

Q. In estimating the cost of cutting and replacing this pavement, did you allow in your estimate for the deterioration of the paving over the period for which it had been laid?

A. No.

Q. In other words——

A. I hadn't anything to do with the deterioration item, that is, on the invoice. I prepared the original cost of the removing and replacing.

Q. That is new?

A. Yes.

Q. And what you have replaced would be absolutely new then?

A. Yes, sir.

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[fol. 537] Redirect examination.

By Mr. Matthews.

Q. What you would replace would have to be new and cost accordingly, wouldn't it?

A. Yes, sir.

[fol. 538] (4) Going Concern Value

[fol. 539] F. H. Lerch, Jr., testified:

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[fol. 540] Q. These allowances that you have made for physical property are for the construction of physical property only?

A. Yes, sir.

Q. Do they have anything to do with or do they contain any element of going concern value?

A. They do not, no, sir.

Q. Would they have to be incurred exactly the same if the plant never went into operation at all—all of them?

A. Yes, sir.

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[fol. 541] Q. You have not testified regarding going concern value, Mr. Lerch; what experience, have you had, if

"any, in determining going concern value or what experience have you had that makes you know the going concern value of plants and property such as these?

A. Well, I have investigated the presence of the factors which determine going concern.

Q. In your general experience that you have testified to, have you covered going concern value?

A. Yes, sir.

Q. As well as everything else?

A. Yes, sir.

Q. It is not necessary to go into that. Have you considered the matter in this case?

A. I have given considerable thought to it, yes, sir.

Q. Will you please tell the Commission what you understand going concern value to be and what you consider it in this case, going into it in such detail as you think proper?

A. Well, going concern value to my mind is the additional expense to which the company is put in attaching its business in building up its organization and generally operating its plant during the initial operation period; by that I mean the cost of operating its plant which is very often and in most instances unusually high during the initial period immediately following the construction of the plant.

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[fol. 542] Q. Do you also include the value that inheres in a live, functioning plant over that of the bare bones of the property?

A. I have read that definition and I think it is the most comprehensive one of going concern value.

Q. Bearing that in mind principally, what is your judgment of the going concern value of the Dayton Power & Light Company as applied to the plants and properties involved in this proceeding?

A. Well, I have always found it a difficult matter to compute mathematically. It can be computed that way. I have not attempted to do it in this case. I think in the case of the Dayton Power & Light it is a very substantial item of cost.

Q. Can you express it—pardon me?

A. And following the general practices of commissions and courts, in their attempt to recognize the substantial nature of this element of value, I would say that the going concern value was at least 10 per cent. of the total cost

of the property as we show it on Page 14 on the reproduction new basis.

Mr. Mullins: Cross-examine.

Chairman Geiger: May I be permitted to explain further right here—because it is very interesting matter with us; we are confronted with this so frequently—that we would like a little elaboration on that. I am just talking about going concern value, has it any relation to the number of consumers that you have rather than a per cent. of the value, of the cost?

The Witness: One of the elements of going concern value is naturally the cost of attaching the consumers. The amount consequently varies or increases with the increase in the

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[fol. 543] number of consumers.

Chairman Geiger: Well, you have fourteen thousand consumers; that would be about nine dollars and a fraction to attach that consumer. Assuming that that would be one way to get at it, what would you visualize as the element that would make up the nine dollars per consumer, if that would be a fair basis?

The Witness: Well, I am not quite prepared, Your Honor, to do more than assume nine dollars. I can give you the elements; whether they would total $9.00 or some other, I don't know.

Chairman Geiger: Well, that will be all right.

The Witness: All I can make is the conclusion. Well, that would be the cost of education by advertisement and by soliciting and by every other means of approach, the consumer to take natural gas.

Chairman Geiger: Well, now, have we a right to assume that if you are going to theoretically reconstruct this plant in a territory where consumers have been educated, to the use of natural gas, that you would need to do it before the consumer attached himself to your plant? The law as I understand it is to take the cost of reconstructing the plant, less deterioration, but I haven't any intention that you are going to reconstruct anything. First, giving us the plant and if we have to re-educate a group of citizens who are accustomed to use natural gas, then you might say that you are reconstructing the citizens' mental attitude toward natural gas and I don't find there is anything in the law that would apparently justify that.

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[fol. 544] The Witness: Well, of course, I can't answer it from the legal point of view, but I do know this, that even in a community or in a territory that is accustomed to using some other kind of fuel, a territory, you might say, contiguous to gas territories, that it is difficult to get people to change over to this type of fuel.

Chairman Geiger: I think you are quite correct on that, but we are assuming that this new gas plant, distribution plant, is to be constructed in a territory where people have been accustomed to using natural gas.

The Witness: Yes, that is true, I would say, would influence the cost of attaching a consumer. It would affect the amount of advertising you would have to do, but you would still, I believe, have to do some of that, because people just refuse to change, no matter what they know about it, from one accustomed habit to another one, to establish a new one. There is a certain amount necessary.

Chairman Geiger: What theories are we to take, if we theorize with you on that. Now, theoretically, you take a year to construst this plant and theoretically during that year, there is no natural gas burned except as the plant may be partially constructed and certain consumers come on.

The Witness: That is right.

Chairman Geiger: Now, theoretically, what do these people that have been accustomed to burning natural gas prior to the time you begin to reconstruct theoretically—what are they going to burn?

The Witness: Well, of course——

Chairman Geiger: Will they still burn natural gas?

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[fol. 545] The Witness: No, my understanding of the reproduction basis is that you start from a perfectly clear field; that in these towns, there would be some other means of heating their homes and doing their cooking and heating their water.

Chairman Geiger: And would your theory be that you had to go into a field that had never theretofore been occupied by natural gas?

The Witness: In order to determine the value of this investment, this business which must be used as a rate base for determining the rates for the charge for the gas,

I would say that you would have to assume that there were only substitute fuels in use in the territory.

Commissioner Klinger: I can't agree with you on that.

Chairman Geiger: You are going then on the theory that you are bringing into a new, virgin field, a new method of heating by gas; that the people in that territory have been accustomed to being heated by coal or by steam heat or something else, and that you meet the sales resistance there after you have established your plant that you would meet in a new territory; is that your theory of it?

The Witness: Answer your first question, in this one question, I don't think in this particular territory, you would have the same amount of sales resistance, as you call it, that you would in a brand new territory where they had never lived contiguous to a natural gas service. There are a lot of assumptions that have to be made in a consideration of a reproduction value basis, but it is my understanding that the reason for including going concern value and why it is considered to be needed as an element of value is that it is a cost to the company in establishing

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[fol. 546] the business, the value of which is the rate base.

Chairman Geiger: Well, if that is true, you are attempting to establish the value of your basis in order to find out what sum would be the correct sum for which you might sell it.

The Witness: No.

Chairman Geiger: Then you would be all right?

The Witness: No.

Chairman Geiger: Oh, you are not doing that?

The Witness: No.

Chairman Geiger: You are theoretically attempting to reconstruct the present-day conditions that exist both as to your physical property and as to your customers. Therefore, do you not have to confront this problem on the assumption that you are going to furnish natural gas to a community that has prior to the date of your reconstruction been accustomed to using natural gas.

The Witness: No, I don't think you can go that far, Mr. Commissioner. As I say, my understanding of fixing the rate base is that you must consider the estimated cost of reproduction less deterioration as one of the elements of that rate base. There is another very tangible element of

value which must be included in the rate base, and we estimate the value we choose to call "going concern value" and we make numerous computations to determine its amount just the same as though we were reproducing it as we reproduce the plant, and that is why I say——

Chairman Geiger: That is where we stick.

The Witness: Well, I mean that is my understanding.

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[fol. 547] Chairman Geiger: We can concede this very readily, then. If you were going into a new territory that had never been accustomed to using natural gas, then you must not only lay your pipes to supply those people, but you must go out and advertise to them the value of gas connection in preference to the other method of heating as they have theretofore been enjoying. Now, that was a problem that you long ago have confronted, and solved in the operation of this concern as it has been operating over a great many years, and as a result, there is an educated group of people who are accustomed to using natural gas, and you are theoretically presenting to them the physical means by which that gas is to be supplied to them and it has still the desire for it that they already have established? Is that the more correct view?

The Witness: I think, Your Honor, that to my mind creates a confusion in an attempt to arrive at the value of the property for rate-making purposes on the mere eliminating from it of an element of value which is inherent in the plant, simply because by the accident of circumstances, that element of value was paid for during the other operations of the plant prior to the time, we will say, of the investigation, or during the life or the history of the plant. As I see it, what we are trying to do——

Chairman Geiger: Well, now, just right there, we would concede very readily that there is an element of value in the fact that people are willing to use natural gas, but what we are trying to get now is how much it is going to cost you to re-establish a physical plant to serve the people who have already enjoyed the advantages of natural gas?

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[fol. 548] The Witness: Well, I would say that, answering that question, just as it stands, that the cost of attaching such business, to this reproduced plant would be con-

siderably less than it would to attach business to a reproduced plant, we will say, in the middle of a state or a territory thousands of miles from any similar gas service. But there would be an element of expenses to——

Chairman Geiger: Oh, there is no doubt about that and that is what we want to get at.

The Witness: Yes.

Chairman Geiger: Now, taking it, what would be the real element of expense? We will accede to this: That you would have to have an office; you would have to have blanks to be filled, contracts to be made, and actual things to be done that would make a connection between you as the producer and the consumer. Now, what would necessarily be done, leaving out the question of persuading the people to use it.

The Witness: Well, that circumstance would correspond quite closely to the opening of a suburb in a town already supplied with gas, and the procedure the company would have to go through to get these people connected to its system, which would mean the coming into the office or the sending of solicitors out to have their applications signed up and the recording and the collecting of deposits, if necessary, or whatever the procedure may be, and looking after their account and such things.

Chairman Geiger: Yes. Well, now, what would that reasonably be?

The Witness: Well, I would not like to answer that ques-

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[fol. 549] tion offhand. That might amount to a dollar, or it might amount to two dollars. I can not answer it very well. But to my mind, that is purely a nominal expense of attaching this business under the circumstances that we are talking about.

Chairman Geiger: I see. You have the theory and have based your amount of $125,000.00 upon the notion that you must not only have the gas at the doorway of the person ready to be served, but you must send your agent, advertise and solicit and persuade and present arguments for removing from the use of an old fuel to a new fuel; and that would cost you money.

The Witness: That would cost you money, yes; there is is no question about it.

Chairman Geiger: That is what the $125,000.00 is?

The Witness: No, that would not be all of what I base my ten per cent upon. The ten per cent and the $125,000.00 are coincidents; the $125,000.00 will be demonstrated in another report.

Q. By what witness?

A. By Mr. Emery.

Chairman Geiger: Well, that is all right, if we have it, *must* you must not just leave it.

The Witness: I would say, Mr. Mullins, in order to clear that point in the Commissioner's mind—I would say that the valuation of going concern value which I would fix would be ten per cent of about $1,290,000.00; in other words, $129,000.00, as a recognition of a substantial item. That is more than Mr. Emery has fixed here by about $4,000.00. It is a coincidence that they are so close.

Chairman Geiger: Well, now, you say it is ten per cent. Now, you have got some basis that leads you to say it is

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[fol. 550] ten per cent. Why do you say ten per cent rather than two per cent, five per cent?

The Witness: I say ten per cent for the same reason apparently that courts and commissions have used the same figure—as a substantial recognition of that element of value. I have never in any court or commission decision been able to calculate why they would use ten per cent or fifteen or eleven or twelve, but the average allowance of commissions and courts allowing such, and making such an allowance, averages about 11 per cent.

Chairman Geiger: Well, then, your testimony now is not based upon your experience or your judgment, but your knowledge of what somebody else has said was the correct per cent—ten per cent?

The Witness: No.

Chairman Geiger: As set by other commissions and other courts?

The Witness: No, it is based on my experience and observation and knowledge of this company in recognizing the very substantial nature of the item.

Chairman Geiger: I see.

The Witness: Now, ten per cent to my mind constitutes a substantial recognition.

Commissioner Klinger: Why didn't you make it five per cent instead of ten?

The Witness: Because I think it is $125,000.00, or $130,000.00 is more nearly the cost of adding such business to such an account.

Chairman Geiger: Well, you have said that you base

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[fol. 551] your notion of ten per cent, because it seems to be near what is the average per cent allowed by other commissions and other courts; is that correct?

The Witness: Yes—well now——

Chairman Geiger: Suppose other commissions and other courts have begun to say it is five per cent instead of ten, would that lead you to change your opinion?

The Witness: No.

Chairman Geiger: And say it was five instead of ten?

The Witness: No, I don't think it would. I, of course, have made numerous studies of going concern value and they have come out in amounts from ten per cent up to as high as twenty or twenty-two per cent.

Chairman Geiger: Well, you do not cover the question: What is the cost, of the money, approaching the people who are accustomed to using natural gas?

The Witness: They are other elements of expense in going concern value.

Chairman Geiger: Well, what are they?

The Witness: Well, there is the expense of training the employees.

Chairman Geiger: Well, that goes back to another point.

The Witness: Well, that is reconstructing theory.

Chairman Geiger: Well, this plant has only taken a year to reconstruct; surely the people who served you before that reconstruction would not have forgotten all about the thing and have to be retrained to do it?

The Witness: Well, we divide on exactly the same point

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[fol. 552] right there as we do on the cost of attaching business.

Chairman Geiger: But there is nothing in the statute that says we shall reconstruct the operators by reconstructing consumers; you are reconstructing the physical plant.

The Witness: Well, I am going to let you discuss that with the lawyers.

Chairman Geiger: Well, of course, there should be whatever is properly to be added to it for attaching business. We want to get at the facts.

The Witness: There is no question in my mind that to the plant the value exists from the fact that the business has to be attached; from the fact that they have the operating organization with men familiar with the plants and operating them and from the fact that a brand new plant is not as easily operated or as cheaply operated as a plant that has been in operation for some time.

Chairman Geiger: Well, now, why?

The Witness: Well, for instance, pipe lines laid in the ground require a great deal of attention after they have been in the ground say through one winter or through a severe rainy period; the back fill has settled; the back fill has to be filled up; it has to be cleaned up and the pipe line itself settles.

Chairman Geiger: In other estimates of cost, haven't you taken that into consideration?

The Witness: No, sir, our estimate of cost is simply putting the plant in once. Now, the cost of going back and realigning some part of the plant in order to correct leaks or something of that kind, to put in revetments at bad

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[fol. 553] places, or to put in back fill——

Chairman Geiger: Well, I think that is all right; what do you base that cost on; how much is that going to be?

The Witness: I am afraid I will confuse you; when I say I have strong ideas, I mean I have not computed the value of them except as they contribute to the ten per cent.

Q. In your judgment, regardless of the details, what is the amount of the going concern value of this company?

A. Approximately $129,000.00 for these plants that we are talking about.

Q. Yes, that is what I mean. You have mentioned as an item which you considered in that connection, the attached consumers, have you not?

A. Yes, sir.

Q. Is that an element of going concern value?

A. It is, yes, sir.

Q. You have also mentioned the trained organization; is that an element of going concern value?

A. Yes, sir.

Q. You have mentioned the seasonal plant; is that an element of going concern value?

A. Yes, sir.

Q. What is the difference so far as line loss is concerned between a perfectly new plant and one that has been seasoned by use for a while?

A. Well, the tendency is, of course, to decrease the leakage and probably eliminate it.

Q. So far as the attachments of consumers is concerned, do you know what the fact is as to the number of persons in the territory of the Dayton Power & Light Company involved in this proceeding who use coal for heating homes —that is, whether it is a considerable number or not?

A. I don't know whether it is a considerable number; there must be some of them.

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[fol. 554] Q. You don't know what the heating load is of that character that they might get?

A. No, sir.

Q. Assuming that there are a good many persons heating their houses and similar places with coal, would the campaign for the attaching of additional consumers today be necessary for the proper and in the proper management of this gas company?

A. It would, yes, sir.

Q. Whether it is old or new?

A. You would have to educate them.

Q. What is the fact as to whether such effort is being made in gas companies at the present time—whether the company has before or now?

A. They are trying to build up their load and that is one of the sources of building it up.

Commissioner Bricker: To what account is that expense charged.

The Witness: Well, that may be charged to most any account, either new business account or something of that kind in the operations of the company.

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[fol. 555] Q. On going concern value, do you consider the number of customers that you have—do you consider that in estimating your going concern value?

A. I consider the fact that the company had customers attached to its system as one of the elements of going concern value.

Q. As one of the elements. If I recall right, I think that yesterday—I don't know if the attorney or you; I think it was you—that said that the number of customers were not considered; is that correct; is my memory correct on that?

A. I don't think that that is quite—that that was the sense of the examination.

Q. Suppose that you had one customer instead of fourteen thousand; would you consider that an element?

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[fol. 556] A. Yes, I would consider that an element; take our own pipe line in Louisiana for instance——

Q. Well, we are in Ohio?

A. Just a second, I think we have a very strong going concern value down there and our line was built initially for a prospective number of customers. I think of six, altogether.

Q. They are not the ordinary consumer, though?

A. Oh, no, they are not domestic consumers in that sense.

Q. No. Does not the number of customers influence the amount that you consider in your going concern value?

A. Well, of course, I would say that it would under conditions which would show that the company was entirely backward in attempting to get business and so forth, but where the company's number of consumers or the business they do shows that they are active in attempting to get the business and have succeeded to a large extent in getting the available business, why I think the number of consumers—not necessarily—the number of consumers is not necessarily the——

Q. It is an element?

A. It is an element; it is an element, of course, which has to be considered.

Q. If you had an increase in consumers, would you not have an increase in valuation then?

A. You would have an increase in investment and so forth.

Q. In valuation?

A. And an increase in valuation, yes, sir.

Q. With the increase in customers; is that correct?

A. Yes, sir.

Q. On the question of advertising which you spoke of just a moment ago; doesn't the advertising expense go into

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[fol. 557] the operation costs?

A. Well, for an operating company, it may be treated according to arrangements made to account for it. I would say offhand that advertising was an operating expense, for an operating company.

Q. Yes. Ultimately, the consumer then pays for that, does he not?

A. No, I don't think the consumer ever pays for any activity of the company at all.

Q. He does not pay for it?

A. No, sir.

Chairman Geiger: Well, what do you mean by that?

The Witness: Well, I mean this, that the consumer pays for a commodity which the company delivers to him and he provides through his rate or is supposed through his rate to provide sufficient funds for the company to carry on its various activities in order to supply that commodity at reasonable rates to the consumer.

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[fol. 558] Q. Do you find that there are any other engineers that adopt this theory as to going concern value in estimating reproduction cost?

A. Yes.

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[fol. 559] Q. When you spoke yesterday of developing a trained organization, am I correct in assuming that you meant of course that in being trained to an effective administration of their duties, there was a necessary reduction in operating costs?

A. One of the principal elements of advantage in a trained organization is the organization's familiarity with the plants themselves, and the manner in which they work and the effect that has upon continuous good service, a brand new organization is unfamiliar with a great many features of the plant—relatively unfamiliar, I mean—and the trained organization is able to operate the plant expeditiously and with a minimum number of employees and so forth.

Q. I think that that ability to render good service has also its relation to the attaching of new business?

A. Well, it is, of course, one of the points which is considered by anybody attaching themselves to the plant—whether they can expect to get service and continuous good service in fact.

Q. Perhaps one of the most difficult problems in training is to develop a proper attitude on the part of the organization toward the public so that they make pleasant customers and easy to take——

A. It is of course, very essential that the contact men of the company with the public be men who have pleasant contacts, and of course, those men are found or developed, with everybody.

Q. If those contacts create irritation or resentment or sense of oppression, it would mean just the opposite?

A. It would tend to decrease that man's value to the company, naturally, and the company would have to look around and get rid of him.

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[fol. 560] Q. How can you say in your estimating this element as a cost of reproduction, that you are going to accomplish the purpose of developing men so that their contacts with the public are lessened in those who attract new business or otherwise?

A. Well, of course, one of the measures of whether they have been successful in that is the age of service of employees and so forth with the company.

Q. Age, however, leads to irritability rather than ingratiating attitude, doesn't it?

A. Well, it does in some cases—personal cases—I think more than in the sense we are talking—not in the sense we are talking about here.

Q. You assume, however, that men who put themselves to the task are able to develop an organization that does make the most agreeable contacts with the public?

A. It can be done, and I think in this case from the gentlemen of the company that I know and have met that they have succeeded very well in doing that.

Q. Then how do you distinguish this element from good will?

A. Well, good will is usually based upon regard which the customer may have for the commodity which he wants to buy or which he wants to use, and even in a competitive industry where a commodity is placed on the market in

competition with a similar commodity by others, the organization can contribute largely to good will by having exactly the feature in it that we consider as one of the elements of going concern value here.

Q. Do you mean that——

A. There is one of the measures of good will in this very same feature of a properly-organized organization.

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[fol. 561] Chairman Geiger: No company, now, ever sets up on its balance sheet, any item for good will?

The Witness: Very seldom, except in very exceptional cases, and as a rule those who capitalized that years ago for some purpose or other, have been wiping it out or abandoning it.

Chairman Geiger: It is all wiped out off of the books.

The Witness: As a rule it is, or taken as a dollar.

Q. Yet it does represent a real property value?

A. It has a very real value, especially in a competitive business and it has a very real value in a public utility business.

Q. Would you say that it comes within the limitations of the statute that it must be property that is "used or useful" in the business of the company?

A. The good will of the company?

Q. The going concern value?

A. The going concern value, I would say would, yes.

Commissioner Bricker: Briefly, Mr. Lerch, the Commission's engineers made a survey of the ways and means and methods used by other commissions throughout the country. In one of those reports from the chief engineer of the Commission, he said:

We do not give any credit in the rate base to going concern values, due to the fact that any company that has to have a rate increase has no going concern value.

The Witness: Well, I don't think that is so.

Commissioner Bricker: You would not subscribe to that then?

The Witness: I would not agree with that.

Q. Mr. Lerch, would you subscribe to the value of that if
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[fol. 562] you are successful in obtaining a liberal rate from the Public Utilities Commission and therefore able to dispense large earnings to stockholders, and it is a concern that is going very good under those circumstances, that its going concern value is that much better?

A. No, I don't think that a condition of that kind which would be a reflection of its earnings, you might say, would necessarily reflect a greater going concern value on account of the particular conditions you named. It might have, however, a larger going concern value because of the other conditions which made it possible for the company to enjoy such satisfactory relations with the Commission and with its consumers.

Q. Well, if it is going good, its going concern value is much different from that value if it were not going at all or if it were going poorly?

A. Yes. But you asked me whether that would contribute to a large going concern value and if the factors which permitted the company to enjoy such favorable position were such as to contribute to a larger going concern, I would say yes; I would say offhand on that assumption that the company for the reason that it was able to do this might have a larger going concern value.

Chairman Geiger: There is one point in there I would like a little illumination on. The going concern value to be subject to a rate must be property used and useful. I can readily concede that attaching business to a telephone line would be of value to every telephone subscriber because it enlarges the field of his communication and the more telephones there are, the better it is for him, but I don't grasp why it is of any value to a particular consumer
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[fol. 563] of natural gas that somebody else is consuming gas. Even if the gas is low, why one person enjoys it and somebody else got off of the line—the fewer there are on the line, the better service you get, and I can not quite grasp why the fact that there are a lot of other people attached to the line is of any particular service to any particular individual other than it relieves the charge because the overhead is spread over many more of them, but how is it used and useful.

The Witness: The going concern value as I view it is an element of value which is just as necessary as the pipe itself, or as the meters or any other element of physical property and it is a value in addition to that. We attempt to arrive at some measure of what that value is by considering all of the features which contribute to it or which we feel have something to do with it, and we base our conclusions upon its inclusion in the rate base upon its absolute necessity and presence. The amount is the only thing that is affected by what our ideas may be of the existence, in varying prices, of the several facts which we find contribute to it.

Q. Mr. Lerch, you speak of the value as being necessarily—the value is not a thing that is necessary under any circumstances; the thing that has value is the thing that is necessary?

A. Yes, if I said value, I meant that the element of going concern, made up of whatever contributes to it, is just as essential to the business of serving gas as the pipe themselves. It is an absolute fact and it exists.

By Mr. Klapp:

Q. In what way is the extension of the pipes themselves?

Mr. Mullin: Just a moment, have you finished?

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[fol. 564] Mr. Tatem: No, I have not.

Mr. Mullin: Will you kindly wait until one counsel finishes before you ask; in other words talk one at a time.

By Mr. Tatem:

Q. In what way is it just as essential?

A. Well, the mere fact that a plant can be built in the city and not serve gas renders it absolutely valueless, but as soon as you attach an organization to it and attach business to it and develop it as a business, you have added a value to it, and that is the going—the element of going concern value.

Q. Before reverting back to some other——

Chairman Geiger: May I ask just one question there?

Mr. Tatem: I am not leaving that.

Chairman Geiger: Right at that point, how is that going concern value you obtain in serving the gas to a particular person who is buying that gas? He is interested in the physical transportation of gas to him and its delivery. He is not interested in the fact that somebody else has gas transmitted to him. Why should he be made to pay the rate estimated or based upon the going concern value to make an element of attaching other people to a line?

The Witness: The consumer is not interested alone in a bare, empty plant; he can not get gas; he can not get service; he can not get anything from a bare reproduced plant. He is interested only in purchasing his commodity from a going concern and consequently if there is an element of value of going concern, then he is interested in supporting that element of going concern because without it he can not get his service; he can not buy his gas.

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[fol. 565] Mr. Mullin: Would this suggestion throw any light on the point the Commissioner seems to have in mind? That the consumer is not interested in any value whether it is value of pipe or anything else; he is concerned in the property and is as much concerned in going concern value as he is in pipe value.

Mr. Tatem: Isn't he concerned in the value when the rate is being based upon it for which he is being charged?

Mr. Mullin: I did not get your question.

Mr. Tatem: Isn't he concerned in the value when it is being used by the utility to establish a rate which will be raised as the result of that being raised.

Mr. Mullin: He is concerned with any part of the value that renders him service; it is the property that renders him service and the value is the value of the property.

Mr. Tatem: I am coming back to that in just a minute in the future, as to whether this is a capital asset or not; but before doing so, may I ask you:

By Mr. Tatem:

Q. If it *is* was merely an estimate, how did you happen to make this going concern value an even $125,000 which is not ten per cent., but nine and a fraction per cent. of the other reproduction costs, set up in your summary?

A. That will be explained to you by Mr. Emery when he testifies. He has arrived at that amount and as I say, we

have included that amount from his conclusions, in this report, in order to have a complete summary of the valuation.

Q. Converting that value into the element of new business, attached, you have 14,000 consumers who use about 37½ dollars worth of natural gas each year and you attach

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[fol. 566] to each of them a value of approximately nine or ten dollars a person for this element of going concern value. Does that seem out of proportion?

A. You have got that value by dividing one hundred twenty-five thousand by the fourteen thousand?

Q. Yes.

A. Well, as I told you, I think you will get a clearer record if you were to let Mr. Emery tell you what is in the $125,000.00.

Commissioner Klinger: As I understand this witness he merely accepted it and used it in his structure only because the other man of his concern had determined that.

Mr. Tatem: That is all.

The Witness: That is correct, that is what I have said. We simply put it in there in order to get it in one summary.

Q. We will not press you as to those items if you do not have them in mind. It is true, however, is it not, that there are many phases in which the capital assets represent a small proportion of the real value of the business; the earnings often reflecting much more than the value of the capital assets, either as a going concern or upon liquidation. In other words, there are many companies who render a service that does not involve a great deal of investment in actual physical property, but when they are able to make handsome earnings, the value of that business as a going concern is very greatly increased and is reflected in the price of the stock of that company, for instance, if it is listed on an exchange.

A. That is true of a competitive business and a non-regulated business.

Q. You spoke in that description of the estimate of good will attaching pretty largely to a competitive business. Of course, you have a little competition among yourselves—if

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[fol. 567] such a phrase could be applied—in that you are selling electricity—heat—as well as natural gas for heat,

and that if natural gas costs more, you might perhaps under certain circumstances obtain and attach new business for the electrical feature and earn more profits in that field then than in the natural gas field; would that be possible?

A. That would be possible, yes, but the features which would govern the cost of the competitive fuels would of course have to be taken into account in each instance. By that, I mean natural gas might naturally cost more and continue to cost more on account of its very nature than the electric power, consequently electric power might supplant it, materially might supplant it, steam or any other means.

Q. Do you know whether or not the natural gas business attached to this enterprise is a result of the energies devoted by this company or whether consumers were trained to use natural gas in this territory prior to that time?

A. I think there was a certain amount of natural gas business going on, but that the most recent efforts have been made to increase that business through campaigns of various kinds.

Q. Natural gas is in close competition with coal, for instance, is it not?

A. Yes, sir.

Q. For house heating?

A. Yes.

Q. And in that feature you have a possibility of developing the good will under competition?

A. Well, to a certain extent that might be true, but generally when you are trying to sell a heating commodity to a householder, they look entirely upon the matter of convenience and cost; cost first, and then convenience, offsetting any differences, but I don't believe that they would at-

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[fol. 568] tempt to pay the company more for gas because they had a good will for the company, if they could conveniently heat their houses with some other fuel, cheaper.

Q. What would you say as to the facility with which new business is attached in the event that the product sold is only being distributed under a monopoly?

A. Well, I could only assume that that would not make any difference.

Q. New business would be quite readily attached if there was nobody else in the field to furnish the service—to furnish exactly the same service?

A. I assume that you are not eliminating the competitive fuels for instance?

Q. No, is there any other natural gas competition in the same territory?

A. Not that I know of.

Q. This company has a monopoly in its field, has it not?

A. To the extent of being the only company serving gas, I think that would constitute a monopoly; whether an actual one or not, I don't know.

Q. Although, you did not set them up, it has its franchises throughout the balance of the county and in the various municipalities and it has the right of eminent domain which gives it an advantage over a private purchaser of rights of way, and being a quasi public corporation, it has many advantages that the law affords, and in those connections do they enter into the element of the value of this company as a going concern?

A. Owing to the fact that the competition of natural gas in these towns would face considerable difficulty, I think that the company has the going concern value due to these very features; however, I don't know that they have all of these advantages which you mean as enjoying; I have not

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[fol. 569] investigated the legal status.

Chairman Geiger: Is there a distinction between going concern value and cost of attaching business or are they synonymous?

The Witness: I think one—the latter—is simply one of the elements of the measure of going concern value.

Q. Mr. Lerch, now, we are to regard this as value of a distinct asset, that, although intangible, and admitting that, as chemical companies do, they made by process of air reduction, get something that is really quite intangible and make it useful and in a sense tangible for business purposes—should that tangible item or that item rendered tangible, at least in theory, not be set up as a capital asset just as any other capital asset of the company?

A. The value which the company may attach to its process and so forth, its patent rights and such other matters, very often is capitalized.

Q. Well, in this instance, now, that you the using, this is a capital item, what would you say as a matter of proper

account, that at least from now on this item, having been determined as of the value of $125,000,00, and being included among the other capital assets, that this company should now set it up?

A. I see no reason why they should or should not. I don't think it affects the presence of the value of the item at all.

Q. No, but doesn't it affect very materially the advantages that the company will obtain from this item if it is or is not set up in this respect: That if it is set up now, and to it from now on are added the expenses that go to further increase assets, those expenses will not be a deduction from

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[fol. 570] operating expenses, but will at once fall into the capital assets, whether you call it undistributed profits or surplus or of distinct capital asset as to going concern, and that if you permit it to be taken both ways, by treating it for a period of time between rate-fixing dates, as an operating cost, and then when you get to that end of that period, setting it up as a capital asset and obtaining a new and increased rate on the basis of it, aren't you compounding the advantage of that asset?

A. No, sir.

Q. Why not?

A. Because the value of the asset is not the cost of the asset. The cost of certain features of the company's operations contribute as a measure of the value of this asset not as the cost of that asset. Going concern value is not based upon a summation of costs entirely. The summation of costs is some measure of what the going concern value is. Now, the value may be more or it may be less at some future time.

Q. I understand we must assume that in all matters, even as to physical property, cost is not the basis of establishing the value upon which rates are to be allowed, but that the actual present reproduction value is?

A. That is right.

A. Assuming that theory, are the elements involved in going concern value such that you are capable of even thinking about them or analyzing them as things that can be reproduced— you possibly answered that question yesterday—for the purpose of establishing a rate?

A. I don't think you can; I don't think that it is a question of straight reproduction on going concern value; it is a question of determining what going concern value is, from, as nearly as you can estimate, all of the measures that

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[fol. 571] you have, and the company's proceedure for any length of time that it is necessary to consider constitutes one of those measures. The cost of what the company has done is not necessarily the measure of going concern value.

Q. When you spoke earlier in the day——

Chairman Geiger: Well, may I ask a question there?

Mr. Tatem: Yes.

Chairman Geiger: Wouldn't you say the proper way for the Commission to arrive at the present value of going concern value is to consider it simply as we consider the reproduction of the physical property:

To find but how much it would take to re-establish this going concern value which now exists, and to allow that as a proper amount covering that item? Do you see what the question is I asked you?

The Witness: May I answer that without just yes or no, because it is a—I would say that the problem we have before us is to arrive at the reproduction cost of that part of the tangible equipment that we can find, and then to add to that tangible cost the element of value which is intangible, inasmuch as it can not be touched, of all going concern value; that in order to determine the amount of going concern value, the Commission should take into account all of the factors which contribute to the going concern value and use as much as possible the amounts of those factors in order to formulate in its mind some idea of the amount of going concern value, but that the amounts that they are so considering is not the going concern value itself.

Chairman Geiger: But what it would take to reproduce

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[fol. 572] it?

The Witness: No; what it takes to measure it as a value. It is intangible and I think reproduction must be confined to tangible property.

Chairman Geiger: Well, but don't we run, then, counter of the statute which says that in order to find the value of the property and to base a rate, we must ascertain the

cost of reproduction and depreciate that according to the depreciation element? Are we, if we work under the statute permitted to treat going concern value in any other way than we do the physical property, towit: To ascertain how much it would cost to reproduce it as it now exists?

I would grant you very freely that there are many elements in which reproduction of property seems to be highly impractical, but that seems to be what the new statutes and the decisions of the United States Supreme Court and of the Courts of Ohio have taken as the measuring of valuing the property upon which a rate may be made or upon which a return is to be had by a proper rate. How are we going to get around that? We run into the same ridiculous situation in reference to a natural gas property where the natural gas is taken out of the ground. Manifestly no human agency can reproduce theoretically the ground or the natural gas in it, so we have to resort to some other method of ascertaining what it is worth. That seems to have been the book value to some extent.

Mr. Mullin: If Your Honors please——

Chairman Geiger: Now, you have just given us a cost of ten per cent. as to what this is; we must have some basis upon which to get to that ten per cent. What are the ele-

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[fol. 573] ments upon which you add to the valuation, of going concern value, substantially ten per cent.? Now, if that other witness has that, why——

The Witness: Well, if I may, I would suggest that when the other witness or witnesses on this subject—if there may be more than one—have testified, I am sure that you will have before you a complete digest of very valuable conclusions and facts; I have simply attempted to testify as to the presence of going concern.

Mr. Mullin: Isn't the question which the Commission asks usually a legal question for counsel to thrash out?

Mr. Tatem: I would like to ask one more question on this before we leave the subject of going concern value.

Q. In obtaining reproduction value of the physical property, you take it as it is and you allow for deterioration; not depreciation. Keeping that in mind you evidently first establish the value of that physical plant reproduced; then you start it going and you charge in it your values, then the value of getting it into a going condition.

Chairman Geiger: The value or the cost?

Q. No, the estimated value which probably is much greater than the cost is set up here?

A. We charge in the estimated value of the element of value which turns it from a bare plant to an operating plant.

Q. If it stopped, would a greater value than that which you had set up, be lost; in other words——

A. Now, wait a moment—a greater value be lost from what?

Q. Then the $125,000.00 for instance in this instance if this plan should stop and would be no longer going, would 205
[fol. 574] you not be ungenerous to your client in limiting that going value to $125,000.00? It would be very little, wouldn't it?

A. If there was, assuming the condition that you have just named, that there is a plant that has no going concern, very naturally there would be nothing but the reproduction cost of the physical property.

Q. Well, it would be even worse than that, wouldn't it, that you would lose more than the reproduction value less deterioration as you have set it up, because perhaps the statute does and perhaps it does not give you the benefit of a value above that of reproduction new and depreciation, if you see what I mean—a value with full depreciation might be very much less than the value with the deterioration only of observed deterioration and don't you in the statute get the full benefit in there of the value of this business of a going concern?

A. Well, as I heard the statute read here, I think Mr. Mullin read it or he read it to me, the physical property itself is treated in that statute on a reproduction basis. I don't know that the statute will refer to a condition you assume that going concern had suddenly stopped business. The reproduction value of a physical property of a concern is the same regardless of any other condition. It is the value of that property as it stands. Its value less observed deterioration is also based as a circumstance; its value for sale or its value for any other purpose is, of course, as entirely different matter, and depends upon a great many other factors.

Commissioner Klinger: Let me suggest to counsel, the suggestion that was made by the attorney for the company,

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[fol. 575] as well as this witness, that this is a field that he himself has not developed. Aren't we going to just duplicate all of this evidence again when the witness who did build up the going concern value testifies; you are going through the same thing. He has merely accepted it.

Mr. Mullin: He did express his opinion, his independent opinion, however, Mr. Commissioner, on the subject.

Mr. Tatem: Yes, and we took it.

Commissioner Klinger: He only enumerated the going concern value which will be testified to through the other witness.

[fol. 576] F. C. Hamilton testified:

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[fol. 577] Q. I see. Another thing: Are any of these general overheads that you have testified about in any manner included in or reflected in going concern value?

A. Not as I define and compute going concern value.

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[fol. 578] Q. What do you understand going concern value to be, Mr. Hamilton?

A. Going concern value is the value that attaches to a property after it has reached the point where it not only

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[fol. 579] has a physical property, but has the business attached; where it has got an organization and that organization functions and after the property has been operated a sufficient length of time to have the "bugs" out of it—to express it in the ordinary language that is used.

Q. That is a term that is commonly used in that connection?

A. Yes, sir.

Q. And what do you mean by that?

A. The trouble is, you don't know what you do mean: in other words, when you have got a new property, you know something is going to happen to it that you have not expected, and you do not know just where to expect it. It may be that you are going to have some trenching that has got to be re-filled; it may be that somebody has carelessly omitted to join a couple of pieces somewhere and you will

have a tremendous gas leak that you will have to go a looking all over the situation for. It may be that somebody has been a little careless and along comes the city fathers and says, "We are going to cut this street down about two feet, and I wish you would lower your pipes." And, "We want to lower the grade of this street", or it may be any one of a million different things.

Q. You sometimes use the expression or the expression is sometimes used in the business of "Seasoning plants", is it not?

A. Yes, after it has been in a while, you have gotten over most of those troubles.

Commissioner Bricker: Well, that going concern value then would not be present in a plant that had been immediately built?

The Witness: No, sir.

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[fol. 580] Commissioner Bricker: It would then be actually acquired through maintenance or depreciation which would be allowed as an expense on the going plant?

The Witness: Well, it might come through no expenditure at all. If you happen to be lucky enough to put a plant in and build it with the idea of serving ten or fifteen thousand customers, and then comes along Henry Ford and builds a plant there and the population is added, you would have an added going concern value that would not cost you a thing.

Commissioner Bricker: The idea of going concern value is somewhat inconsistent, though, with the theory of reproduction new?

The Witness: No, not at all.

Q. What effect does the addition of new consumers have on going concern value?

A. If they are added at a reasonable rate why of course it increases the going concern value.

Q. So you have——

Chairman Geiger: Well, now, just one moment, if you will pardon me; I promised not to talk, though.

Mr. Mullin: Go ahead, glad to have it.

Chairman Geiger: Going concern value—is that a distinct thing from acquiring business?

The Witness: From acquired business?

Chairman Geiger: Acquired business, is that a part of going concern value?

The Witness: Acquiring business, the cost of business is a part of going concern value in my judgment.

Chairman Geiger: But they are not synonymous; one is included in the other?

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[fol. 581] The Witness: One is included in the other.

Q. Does the addition of new consumers to a plant result in any benefit to the existing consumers?

A. Yes, it does, for two reasons: First, the addition of consumers divides certain fixed expenses; in other words, you have got to have the superintendent; you have got to have a lawyer, and you have got to have certain other things; you have got to have a president, and you have got to have a secretary and you have got to file reports with the Public Utilities Commission; you have got to do things of that kind whether your property is small or large.

Q. And you have to have pipe lines of some size, too?

A. Yes, and you have the minimum size pipe line that you must have; the addition of consumers divides a lot of those fixed overheads and spreads them more widely with the resulting ability to cut rates.

Q. Have you any instance in mind in your own experience in which the addition of new consumers has resulted in direct benefit to existing consumers in reduction of rates?

A. Yes, I have a very decided——

Q. In addition to adding new consumers does the inducement to existing consumers to use more gas work the same way?

A. It does.

Q. Please explain what you mean, Mr. Hamilton, and illustrate it?

A. I will give you an exact picture. Up to 1925, along in the summer of 1925, we did not own the Kansas City Gas Company which has a distribution system in Kansas City, Missouri. We did supply gas at the town border to that company. It was a part of the United Gas Improve-

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[fol. 582] ment Company's property. Their sales had been going down—per customer sales I mean—and they

were about to ask for an increased rate. Their rate at that time was an average of 97 cents. We were very much opposed to it, because we were selling them gas at the town border and we thought that a rate of 97 cents was too high, and that a higher rate would again further restrict the sales and we were interested for that reason and finally bought the Kansas City Gas Company. From that date to this, we have spent $611,000.00 in our "new business" campaign on this property. We have added 11,150 customers and we have raised the average sale per customer from 48,600 per year to 74,000 per year, with a result that our sales to domestic consumers this last year ending as compared with the year ending in October, 1925, has been increased two billion seven hundred seventy million *dollars* (cubic feet), at a cost of about 22 cents for each thousand feet of added sales.

Q. What do you say——

A. About 22 cents for each thousand feet of sales added.

Q. Did you say million something?

Mr. Matthews: You used the word "dollars" where I think you meant "cubic feet."

The Witness: An increased sale of 2,770,000,000 cubic feet, which is at a rate of about 22 cents when our expenditure is computed; with the result that we have been able, instead of raising the rate from 97 cents, we have lowered it to a rate that starts at a dollar and a half for the initial, but which averages for domestic consumer at the present time about 86 cents.

Q. You did that voluntarily?

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[fol. 583] A. Yes, we did it as rapidly as we could because it reduced the sales resistance. In St. Joseph, Missouri——

Q. Is that natural gas you supply there?

A. That is natural gas we supply there; they have had natural gas before, and have had for twenty-five years.

Commissioner Bricker: When was the rate reduced with relation to the date of the acquisition of the plant?

The Witness: It has been reduced twice, it has been reduced, the first time was about two years after we acquired the property and the last time was about a year ago. It has been done in two different steps.

Commissioner Bricker: Did you make your increase in the consumption follow the reduction of the rate or did the reduction of the rate follow the increase in the consumption?

The Witness: The increase in the consumption, the largest portion of it came in the earlier period before that was on, in other words.

Commissioner Bricker: Before you changed the rate.

The Witness: When we put in a group of salesmen they are very naturally going to pick the chaps that are easiest to sell first and sell them some equipment. The later additions of business come hardest.

Commissioner Bricker: Yes.

The Witness: In Saint Joseph, Missouri, which we took over in 1928, they had had natural gas up to about ten years ago——

Commissioner Bricker: Just one question before we pass from that: In this campaign for additional business, that was largely conducted through a sales force in the selling

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[fol. 584] of equipment.

The Witness: In the selling of equipment, yes, sir.

Commissioner Bricker: Did you deduct from the cost of the additional gas sold, the profits made on the equipment sold before arriving at the 22 cents?

The Witness: No, this $611,000.00 is the net cost to us of selling the equipment. It has to be deducted from that, whatever profits we made on the equipment.

Commissioner Bricker: On the equipment business?

The Witness: Yes, sir.

Commissioner Bricker: Before you figure that 22 cents?

The Witness: Before we figure the 22 cents, yes, sir.

In St. Joseph, Missouri, we had natural gas up to about ten or twelve years ago, when the Missouri River washed out the river crossing. They had an artificial gas plant. Gas was being sold at $1.75 a thousand and they were selling approximately thirty dollars of gas per consumer. We bought the company, started the pipe line to replace the pipe line; we have since, between October, 1928, and the end of March, spent $91,000.00 in that town; we put in 20 men; the number of customers has increased very slightly. They had a good saturation at the time we went in there.

The $32.00 for the artificial gas that was being sold had

a content of about 560 B.t.u.'s, whereas the natural gas we are now selling has a content of about 1000 to 1050 British thermal units. Reducing the amount of sales in cubic feet of the artificial gas to its equivalent in heat units, we have increased the sales in that town 480 million cubic feet on an annual basis at an expense of $91,000.00, which is at the

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[fol. 585] rate of about 19 cents per thousand of annual sales that have been added.

Chairman Geiger: Just where is that used in this case.

Mr. Mullin: It illustrates the fact that the addition of new consumers is an element of value entering into the property of the utility and also that it results in direct benefit to consumers, is the reason why the Commission should be glad to have it done, and make proper allowance.

Mr. Klapp: Mr. Mullin is this on the theory that you are reproducing? Yesterday, I understood that your position was that it is the actual value of the going concern value new. Now, it seems on this theory in questioning your witness that you are trying to arrive at a reproduction cost.

Mr. Mullin: I said to the Commission yesterday that Judge Geiger's statement was broader than I had intended the preceding day.

We are not limiting our theory as to what going concern value is; we say it is the value inhering in the plant, which is operating successfully with consumers attached, and so forth as described by the United States Supreme Court in the Indianapolis Water Company case, and the Des Moines case, to fix the value of that kind of a plant over one that has nothing but personal property. There are many elements that enter into it. Mr. Hamilton has been describing some of them. Whether you regard them as cost or not is immaterial, in the value is there. He has described the element of the addition of new consumers and new business. We are showing now by Mr. Hamilton that that results, as I said, in addition to the value of the plant and property, and also for the purpose of showing

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[fol. 586] the equity of the thing, that it results in benefits to the consumers directly.

Commissioner Bricker: If this plant of yours that is now under consideration were to get a rate increase and the

consumption would be decreased to the point where there was less return than there is at the present time, what would be the effect on your going concern value?

(Previous question read.)

Mr. Mullin: Read that again, I don't just catch it.

Commissioner Bricker: If you were granted a rate increase by this commission sufficient that the consumption of gas would be diminished to the point where the net return to the company would be less than it is at the present time, what would be the effect upon the going concern value of this company?

Mr. Mullin: The net return?

Commissioner Bricker: Yes.

Mr. Mullin: To the company. It would depend, I assume upon a great many of the facts and circumstances of the case. I could not answer offhand as to whether it would or would not reduce the value.

Commissioner Bricker: What would be your opinion, Mr. Hamilton?

The Witness: I think it would reduce it.

Mr. Mullin: That is the net return?

The Witness: Yes; it would not disappear at all; in other words, there would be a going concern value there as there was in this case; in other words, in this Kansas City Gas Company—and by the way, Ford, Bacon & Davis made the valuation of this property, very similar to this particular property. Now, on that particular property, it [fol. 587] had a going concern value; it had 77,000 cus-

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tomers attached there; they were not selling them enough gas, but there was the opportunity there. You had them, of course, you had your connections. We went in by our men, right on the job, and the next day we put them on the job, and we handed them the meter book and said, "This is going to be your job; we want you to call on every one of these customers and we want you to do something to add to the value." Here is the point, in other words, we know this rate was in our judgment too high, because it was above what? Our competitor with oil down there. And as a result of maintaining that, they had allowed nearly thirty thousand oil burners to get into that town.

Q. Is natural gas as a matter of fact in conflict or in competition, rather, with oil and other fuels?

A. Yes, it is in very close competition down in that country with oil because oil is as easily handled in the house as is the gas, practically. It is in close competition with coal, almost any place, when people don't consider their own comfort, usually—by that, I mean, if you figure the cost of coal plus the cost of janitor's service, plus the cost of ash removal and that sort of thing, the competition from coal is not so strenuous although there is an advantage in prices in all probability as compared with the rates that we have and that are ordinarily in effect. There is an advantage in price in favor of coal; there is a disadvantage from the standpoint of convenience.

Q. Does a trained personnel have anything to do with going concern value?

Chairman Geiger: Let me ask one question there.

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[fol. 588] Mr. Mullin: Yes.

Chairman Geiger: I take it I kind of get into this thing a little bit: You have in your organization a great many gas companies all over the United States have you not?

The Witness: Yes.

Chairman Geiger: And you furnish the gas to the consumer, which must be made to meet the competition that is exist- in those territories?

The Witness: Yes, sir.

Chairman Geiger: At one place, you are able to charge quite an amount more per thousand per cubic feet than you are in another place in order to meet competition?

The Witness: There is very little difference between those rates, because, if you will permit me to make clear—the first couple of thousand cubic feet of sales per month is not in competition very much; it is only in competition with electricity; that is the amount of gas for cooking and no electric rate can compete at the present time on a basis of economy. In a properly made rate schedule, you must collect a high fixed amount of the initial; if you do not, you are carrying a lot of customers that are carried at a direct loss, and the loss incurred is handed over to somebody else so that that portion is not competitive, but beyond that, your block rate must be made a competitive rate, because, this, you get over into the question of renewal for heating, and when you do that, that has to be made a

competitive rate, so that those rates are fairly uniform. I don't think there is more than five cents difference in our schedule, and that is large because of the sales—and that is largely because of the sales—between Denver, for in-

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[fol. 589] stance, and Kansas City.

Chairman Geiger: You mean for the amounts above the first initial?

The Witness: No, for the whole average sale.

Chairman Geiger: For the average?

The Witness: Including the house heating, the same amount in those towns, I don't believe would vary five cents a thousand.

Chairman Geiger: What is the average rate among your companies for natural gas per thousand cubic feet?

The Witness: On a basis of a sale of 75,000 feet which is about the thing that you expect to get in a normal town per customer—per domestic customer—we get about 86 to 87 cents for the average. That comes from a high initial step and probably a 50 cent low block.

Chairman Geiger: You run up to what? 87 cents?

The Witness: It averages about 86-87 cents. I can give it to you right here, I think. The rate in Kansas City averages 86 cents; the rate in St. Joseph, 88; the rate in Denver about 90 cents; in other words, the development work has not gone on as long in Denver; I think the rate schedule is identical.

Commissioner Bricker: Where is your gas field?

The Witness: Denver is supplied out of Amarillo. Kansas City and St. Joseph and about 100 towns, oh, I guess twenty fields; there is a lot of fields and pipe lines through Oklahoma and Kansas and also they are connected with the pipe line that goes to Amarillo, and there is gas going into those pipe lines out of this new-old Oklahoma field;

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[fol. 590] there is some going in out of the old Seminole Pool and I suppose—I know there are twenty pools that are connected to that net work.

Chairman Geiger: Do you buy your gas or produce your gas?

The Witness: We buy some of it and produce some of it.

Chairman Geiger: What is your average price for gas?

The Witness: In the distribution companies?

Chairman Geiger: Yes.

The Witness: Our gate rate in Kansas and Oklahoma is 45 cents.

Chairman Geiger: To the producing company?

The Witness: To the pipe line company, yes, sir.

Chairman Geiger: And you sell it for 85 cents?

The Witness: 85.

Chairman Geiger: So that you have a profit, between what you pay and what you get—a gross profit of 45 cents?

The Witness: A gross income of about 40 cents.

Chairman Geiger: About 40 cents; and you say that is fairly standard throughout your district?

The Witness: Yes, it is; that is compensatory, if you get your sales up; in other words, in this Kansas City in fact, when their sales were about 48,000 they were going to go to the Commission and ask for an increased rate—and they needed it and could have demonstrated the necessity for it on the basis of those sales.

Chairman Geiger: Well, what do you figure your necessary profits on just your stock issue and what is necessary to pay a dividend or upon the money that you have actually

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[fol. 591] invested in the property—the worth of the property?

The Witness: Every one of our operating rates carries on it the cost of reproduction new built up by my men on this basis, and every manager is expected to earn a return on that value.

Chairman Geiger: On what amount?

The Witness: Sir?

Chairman Geiger: What gross or net return on that amount?

The Witness: We want to make, if we can, as near a level fair return as is possible. We have assumed all the time that we can not do a good job if we do not make eight per cent.

Chairman Geiger: You are satisfied with eight per cent?

The Witness: No, we would like to make lots more.

Chairman Geiger: Well, you are willing to do business for eight per cent.

The Witness: Yes, sir, and we can do that because we can secure money cheaply. There was a time when Doherty & Company could not, but that time has passed.

Q. Mr. Hamilton, what do you find——

Chairman Geiger: Well, your profits come from the fact that you can get money for less than eight per cent. to invest in gas companies producing more than eight per cent.?

The Witness: Yes, sir.

Chairman Geiger: That is the only element of profit you have.

The Witness: That is the only element of profit we have. Doherty & Company have an operating contract with the

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[fol. 592] Cities Service Company to operate those properties at cost and that has been in existence ever since the company was formed as Doherty & Company.

Chairman Geiger: You don't pay a fixed dividend; you pay a stock dividend and pay it partly in cash and partly in common stock?

The Witness: Partly cash and partly stock.

Chairman Geiger: What is the average rate of your bonds?

The Witness: Our five and a half bonds at the present time—for the thousand dollar bond with no stock warrant attached is selling for 84¼; that is the five and a half per cent. bond.

Chairman Geiger: How much does that produce to the purchaser?

The Witness: That will produce to the purchaser about six one-quarter, I should judge—just guessing at it now, but it is not far from six one-fourth per cent.

Chairman Geiger: You have your own sales organization, haven't you?

The Witness: Yes, sir.

Chairman Geiger: For the sales of your bonds?

The Witness: Yes, sir.

Chairman Geiger: And your stock—you have no preferred stock?

The Witness: We have the preferred stock of the Cities Service; it has 112 million dollars of it outstanding; it is a six per cent. preferred and I think it is selling about 90,

but I swear I can't tell you honestly, I don't own any of it; I don't own any but common.

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[fol. 593] Q. Mr. Hamilton, what do you find the average cost to be of attaching consumers to a natural gas plant, getting new consumers?

A. It will cost roughly, to attach them, and by attaching them, I mean attaching them, and sell them enough equipment so that they will become a user that is worth something to you—it will cost you something between fifteen to eighteen dollars.

Chairman Geiger: Fifteen to eighteen dollars for what?

The Witness: To get consumers on the line and get them using equipment.

Chairman Geiger: Well, now, that is in what sort of territory, the territory sort of virgin territory?

The Witness: Frankly, I would rather go into virgin territory.

Chairman Geiger: You mean it is easier for you to take a group of people that never used natural gas than it is to take people who have used?

A. I would. I would for this reason; if they had been using natural gas for some time, they have got some very poor equipment, and as a result of that inefficient equipment, they have got in, they will have high bills, and they will hate the gas company, and when you go in and say, "well, now, your trouble is just your own fault, you won't take and buy the best; your use of the cheap equipment, there is where your high bills come in," there you are going to get into an argument, whereas if you go into a new virgin territory, and sell on the basis of efficient equipment, and he don't have these high bills and you don't have that trouble.

The public utility companies in the natural gas business

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[fol. 594] were forced into selling equipment. The man that had a hardware store naturally handled that one that gave him the biggest margin of profit, and therefore the one that was probably the poorest piece of equipment. It was his only interest. He handled it for profit and once it was sold, he forgot about it and it went out on the line of the gas company and because it was cheap and because there was a big margin of profit on it, it probably used

two or three times as much gas, and right there, the gas company began to get into hot water. It was their fault.

In all of our organization—we sell about a million and a quarter dollars a month of equipment—about fifteen million dollars a year is our total sales of equipment of curling irons and ranges and washing machines and stuff. Anybody who is going to sell a gas range or anything of that kind, they are very promptly told to turn a sample over to the Research Department and it is tested out there, and if it is not efficient, we won't have anything to do with it. The equipment that we sell is higher prices from the standpoint of cost to us than what would be sold by the man down the street in all probability; we sell it to the customer at a lesser margin because our interest lies in getting it on the line and getting it to using gas or electricity as the case may be; but it was those things that practically forced the utility companies to go into the business of handling natural gas appliances.

Chairman Geiger: Of course, where you have the advantage in selling the equipment, the profit on it is guaranteed by the rate you charge, you put it all in and subject to your regular affairs, or do you keep it separately?

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[fol. 595] The Witness: We keep our commercial department separate, have an account separate, and has a manager, but they are in the same office, in almost all cases, with the operating gas property.

Chairman Geiger: Do you charge them up rent?

The Witness: Charge them up rent, charge them their advertising, charge them up their clerk hire, their accounting, and we charge them also the interest on their money, because to sell the average customer—and I am not talking about men in your position or mine—but to sell the average customer any equipment, you have got to sell it to him on a time-payment plan or you won't sell it often enough to get your load up.

Q. Is that what you do?

A. On eighteen months is the ordinary time that we give them to pay for a piece of equipment like that.

Q. In your judgment does the training of a personnel have anything to do with going concern value?

A. Yes.

Q. Why; explain that please?

A. For this reason, you can only have an economically operated property when you have an organization that works well together, who know not only their own job, but know who is taking care of the other job and who to go to for information and how to get it quickly and how to handle complaints amicably and nicely, how to meet the public right, all of those things are a matter that can not be created out of thin air in a second. It takes time. They have to be built up. You have to pick and choose. In other words, I can best describe it like this: Each year we take into our organization about 200 graduates of the

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[fol. 596] engineering schools of this country. At the end of about six months, we have about 100 of them left. Some of them are lazy; some of them possibly are not quite what they should be; some of them are inclined to be fretful and visionary and we begin sorting them out; at the end of the two year course that they go through, we are well satisfied if we have 50 of those fellows left, but they are good men; they have been through the various departments of our company. For instance, they will have passed through our statistical department in New York and then when they are sent out on a property, having passed on that, if John Jones and Jim Smith did not send in such facts and did not get them in the right shape, when they get out on the job, they will try and get them in the shape we want them.

Q. Is that all for the benefit of consumers?

A. Oh, of course, because it gets you the high type of individual, that particular training gets a young man who has got a lot of usefulness that crowds into him in his circuit of experiences in the various departments that in a normal working situation, he probably would not get in ten years; he will have one job and only one and he would see only the one side of the picture whereas, in those two years, he sees a lot of sides.

Q. Then does that tend to improve the service and reduce the cost of it?

A. Oh, yes, we are not altruists; we do it for a purely business motive.

Chairman Geiger: Do you make your rate-payer pay what it would cost to educate these men?

The Witness: How it that?

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[fol. 597] Chairman Geiger: Does the rate payer pay to educate all of those men?

The Witness: He should not pay to educate that man; he does not pay except as he pays to educate any one of us. We know that ours are being paid for, and that we are always getting some education as we go along, or else we are dummies. Now, that is always paid for.

Chairman Geiger: Well, that is all right, that is considered a part of your running expenses, and is it proper to consider that as a part of your reconstruction value?

The Witness: Yes, he should pay a return on it; he should not pay for it, possibly, but he should pay a return on it; it is an item of value.

Chairman Geiger: An item of value, but not an item of reconstructing your physical property?

The Witness: Oh, yes, yes, it would be an item of constructing new ones; it is an item of reviving your value; in other words, every once in a while, we pick up a property that its present managers have not made a success of, and the difference between our owning it and their owning it is the difference between success and failure, is the difference in organization. In other words, this difference in Kansas City is the difference between the increased rate and lowered rate is the difference of a trained organization that knew the gas business.

Chairman Geiger: In the experience we have had with Kansas City, was not very good.

The Witness: That was years ago.

Chairman Geiger: Just about a month ago.

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[fol. 598] The Witness: Oh, no, there has been no increased rate in Kansas City.

Chairman Geiger: Well, we are talking about Kansas City. The owners and interests have been able to put up rates in Ohio Telephone?

Mr. Mullin: In the telephone case.

Chairman Geiger: Yes.

Q. Have you had any experience in Ohio in the natural gas business?

A. Yes, sir, have had, but we are not in the natural gas business in Ohio at the present time.

Q. Your experiences that you have been testifying to is experience in Ohio?

A. Yes, sir, except where I have specifically named these various towns.

Mr. Mullin: That is what I mean.

Chairman Geiger: Whom do you buy your gas from in Ohio?

The Witness: We haven't any properties at all in Ohio at the present time. We have sold our properties to the Columbia Gas & Electric Company. We did produce some of our gas at the time when we were in the business, and we bought some of it from the Crawford interests at that time; I mean that is away back.

Chairman Geiger: What towns do you serve in Ohio now?

The Witness: None.

Chairman Geiger: None at all?

The Witness: No, none at all. We did have the artificial gas plant at Toledo and we did have some other natural gas distribution.

Q. Would the appraisal and valuation of the properties

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[fol. 599] of the Dayton Power & Light Company be complete if it did not include the element of going concern value?

A. No.

Q. I just want to get that; is the character of the value to which you have been testifying a valuation that is made in commercial transactions generally for the purpose of purchase and sale and all other commercial purposes?

A. It is exactly the same type of valuation which is made for me by my own people or by outside engineers when we want to buy a property. It is made for me on the same basis when I want to consider the sale of a property, and we would take the same valuation to present to Burroughs, for instance, of Harris Forbes & Company, who is their engineer and used to be engineer to the National City Bank, and their people went back to them to present a valuation and back up a bond issue which we want them to handle for us.

Q. As a matter of fact, if it the same that is made generally in the business?

A. No question about that, it is exactly similar.

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[fol. 600] Q. I just wanted you to revert a little further in regard to going concern value there, the matter of attaching new customers and the matter of trained personnel that you had given as elements that go into going concern value in the making up of going concern value. Any expense that is connected with building up those elements, would it be or would it not be paid out of what we term operating expenses of the company?

A. Well, it would be paid out of the gross revenue which they made if that gross revenue was sufficient. In one of these towns that I mentioned, it was not sufficient.

Q. Well generally, they could?

A. Yes.

Q. Generally, it would be paid out of gross revenues?

A. Yes, sir, it would.

Q. And be charged to operating expense?

A. Of course in this Denver situation such as it has been done has been done on money advanced by the parent company because the sales are not yet sufficient to pay the fair operating expenses of that project.

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[fol. 601] Q. Then after you have paid for this training of personnel and attaching of customers, you say that the value which attaches to that should be added to the value of the physical property in itself?

A. Yes, sir.

Q. That added value; and then, in effect, isn't it true, Mr. Hamilton, that you are asking the consumer now in a proposition of this sort that we have before us today—you are asking the consumer to pay you a rate of return on an item of value which they have already paid for?

A. No.

Q. And shouldn't it be that, if anything, the company has an item of value in this case of $125,000.00, that the consumer has bought it for them and now they want a rate of return on it?

A. No, the consumer was not on the line until after you made the expenditure; you made the expenditure to get him on the line there; he didn't put a thing in it.

Q. Well, that probably is true directly, but indirectly it came out of the operating expenses which was in turn taken out of gross revenues; isn't that true?

A. As I say, if the gross revenue is sufficient, you took it out of gross revenue, and if you did not, you took it out of other funds provided by the stockholders, and in either case it came out of the stockholders' pocket, because it was money that he collected on a legal rate, which was his property, and to which he was entitled; he could have paid so much in the way of dividends or he could have used it in the way of dividends and then go and borrow the money to attach this business in which you would have approved it without question. In other words, just because it happens to be done this way, people get mixed up in their

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[fol. 602] thinking in regards to who owns the money. If the stockholders had declared a dividend of this exact amount, and they had taken that, and they said now, we are not going to attach business except on money which we borrow from Harris, Forbes & Company, or from the National City Bank, there would be no question about the capitalizing of it.

Q. Well, now, generally, this is the general proposition; you say that the company has to go down in what we would say literally into its own pocket to get the money for building up this going concern value?

A. No question of these amounts that I listed here; the parent company advanced those and loaned them to the company because the operating expenses were so high in comparison to the small revenue and on the small sales that we had there wasn't any margin to spend for new business activities.

Q. Now, you are referring to a special case there, are you not?

A. I am referring to three cases of very good sized towns, two of which have had natural gas for years, and another of which had had artificial gas for many, many years; that there is nothing special about.

Q. That is, they are representative?

A. They are representative of what has to be done to get the business going; in other words, there has been natural gas in Kansas City for—oh, I don't know—oh, I suppose twenty-five years.

Q. Well, I have understood that from your discussion here, this was built up along as the business was carried on and that there wasn't any special personnel or any spe-

cial funds going into the building up of this. It was all taken out of the general operating expense?

A. It is all charged to the general operating expense

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[fol. 603] that the money in this case had to be provided by us, because there wasn't any there to do it.

Q. But is that representative now of all cases?

A. It is not representative of a well-managed property that has been well managed for a long period of years, because they will have in the past, as they attached these customers, have sold them the type of equipment and the amount of equipment to make good customers out of them as of that time, and they did it, a few customers each year, as the town grew.

Q. Well, in connection with this case, now, as you are acquainted with the business of the Dayton Power & Light Company, would you say that would be the case here?

A. This has probably been added over a long period of years, yes, sir.

Q. And wouldn't the consumer pay for that?

A. No.

Q. Over this long period of years?

A. No, sir, he pays for gas at a reasonable rate.

Q. And that rate is based upon all of the costs of operating the company, and that is all added in and charged to the consumer, is it?

A. No, not charged to the consumer, what is done—here is the thing that you must not get confused; you get a rate, and usually after you get all through with your litigation and that sort of thing, the rate is certainly not such as to yield an excessive return on a public utility. Having gotten that, you then deprive your stockholders of a part of the dividends which the Commission, in fixing the rate has assumed is going to be paid to them, and invest it in property, and that property that it is invested in is the going concern value that is created by those sales efforts.

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[fol. 604] Q. Just going back for a minute, Mr. Hamilton, to this question of going concern value and the matter that was brought up by Mr. Klapp, you answered that the stockholders paid for that value; how do you distinguish between the stockholders paying for that value and the

stockholders paying for the gas purchased; isn't it a fact that the consumers pay for both?

A. The consumers pay all of the money which the company receives. If that money is sufficient above operating expenses, the stockholders begin to get some. By any amount which they expend out of those receipts, they reduce the permissible dividends that they can take out so that while the money originally comes from the consumers,

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[fol. 605] in some cases it is a decisive deprivation of the stockholders of their returns which were assumed at the time the rate was fixed—in other words, the Commission meant to allow them an eight per cent. return.

Q. Well, now, it is no more of a deprivation than in the case of the stockholders or the company paying for your gas which is consumed, is it?

A. With this difference, the stockholders have some options about spending money for attaching business, and none whatever about buying gas.

Q. But if they do elect to spend money to buy customers, that is just the same, is it not, as buying gas?

A. Certainly, the difference being that they elect to do that as a basis of investment to create something of value, and there would be no reason for so electing, if they have to be deprived of that value.

Q. They purchase these customers for the same reason they purchase gas—that is to make a profit on them?

A. Sure, and for the same reason that they buy and construct the distribution system—with the hope of profit.

Q. The cost then of attaching customers is the operating cost just the same as the cost of buying gas?

A. No.

Q. It is carried on the books as an operating cost, is it not?

A. It is carried on the books as an operating cost but it differs in this: The cost of attaching business has to be gone through only once for a particular customer and it creates something which is fixed; it is not something that recurs day after day after day, for the same customer, whereas the gas you purchased, you have got to buy enough to supply them today and tomorrow you have to repeat the performance and so on down through.

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[fol. 606] Q. Well, you don't mean to imply that the field of consumers is always fixed; it is fluid, by that you are attaching here and losing there?

A. That is true, not so much in losing; there are towns, of course, that are declining in population, but they are few and far between; the ordinary town is growing; you lose them in the sense of having them move from Eighth Street to Tenth Street; you lose them at Eighth Street, but you get the same customer back at Tenth Street.

Q. Did you answer the question: It is not a fixed proposition, it is a fluid proposition, the business of buying customers, it is always varying to some extent?

A. Not very much for this reason——

Q. Well, just the question is—you are just now going to qualify it?

A. I am going to qualify it for this reason.

Q. If you will just pardon me, "For this reason", I think we have your qualification, I am just getting down to answer the question?

A. No.

Mr. Mullin: I think the witness has a right to answer the question.

The Witness: I want to answer this, for this reason, you have to make it definite. John Smith may live at 468 Fifth Avenue; he owns that house. We sell him a gas furnace and get it installed in that house. Now, while we may lose John Smith, the fellow who moves in after him is going to use that furnace; we have not lost the business that we created by the sale of that furnace.

Q. May you not have lost it in that John Smith does not care to pay for the added expense for heating his house by

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[fol. 607] gas, and he may just describe the furnace?

A. Oh, sure, we can lose it to competition always.

Q. The point that we are trying to make is that you would not say that you could any more run a gas company without your customers, than you could without gas?

A. That is true.

Q. And you have got to purchase both, have you not?

A. Sure.

Q. And you have got to keep expending money to keep both, do you not?

A. We don't have to spend much to keep customers after we once have equipped them.

Q. Well, to keep your field of customers?

A. Not very much.

Q. But you do spend——.

A. Oh, we spend some, certainly.

Q. You put that expense in your operating account?

A. Yes, sir.

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[fol. 608] Chairman Geiger: As I understand it, the Supreme Court of the United States has said that in estimating the value of a property for the purpose of fixing the rate, you must ascertain its reproductive value and make the proper depreciations and give major consideration to the value as so developed. Now, to what do you give the most consideration if you are buying a piece of property?

The Witness: Two things: First, the physical property that is there on which at some time, if I am successful enough in operation to earn a fair return, I can defend that fair return and not have it taken away from me. That is one, and the next is, what is the present condition of its earnings? And on that, I have got to make up my mind, if the earnings are low, whether that is a result of poor management or whether it is a result of a poor location, a poorly conceived project in a situation where neither they can ever make it earn or I can make it earn, so that for the purchase and sale cost item—that is not considered in rate-making—this earning capacity—it can't be considered in rate-making, because that would mean that you would increase your rate as the earnings went up and decrease your rate as the earnings went down, because of the change that those earnings made in the valuation.

Chairman Geiger: Well, you say you give consideration to the condition of the physical plant?

The Witness: Yes, sir.

Chairman Geiger: Well, you say you give consideration to the condition of the physical plant?

The Witness: Yes, sir.

Chairman Geiger: Do you mean the physical plant in-

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[fol. 609] cludes the overheads?

The Witness: No, they do not, Mr. Commissioner. The physical plant is just mere pipe in a gas company, just

exactly as there is nothing but wood in that desk, and these overheads are no more intangible than the labor that went into that desk as I consider.

Chairman Geiger: But you give them no consideration?

The Witness: Oh, I do.

Chairman Geiger: You don't care whether there has been a high price of attaching business or a low price or whether the money has been easy at the time the money was required for the purpose of constructing that plant or whether the legal fees have been exorbitant or anything of that sort; what you look at when you go to buy a plant, is going over it with the experience of a sound judgment and say, Here is a plant in a given physical condition, either run down or kept up to a high degree of perfection, and then you go over to the office and look over the income and see what they have been able to take in and probably look over the expenses of operation, the salaries of their various people and all of that sort and finally come to the conclusion as to what would be a price at which you could buy that property and stand to make some money on it. That is the way you do?

A. That is perfectly true, but to arrive at that conclusion, I must have a valuation of the physical property, particularly if it is a utility because——

Chairman Geiger: Well, we are thoroughly agreed upon that.

The Witness: For this reason, Mr. Commissioner—let

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[fol. 610] me finish that——

Chairman Geiger: If it is a utility, it is a thing you must have for two purposes, one to help you ascertain the physical construction of that property and the other to have in mind the picture of the value which you establish for the purpose of justifying the rate, if you have to increase the rate, you want to know what you can prove in a rate-making case; is that correct?

The Witness: Not only to increase the rate if we have to, but to defend the rate they now have, if we have to do that.

Chairman Geiger: Well, that is the idea you have in mind as far as all of these overheads are concerned?

The Witness: No, the overheads are no different if it wasn't a utility at all.

Chairman Geiger: Just answer yes or no, and then we will get along better. You have said you considered only the physical property in buying a piece of property?

The Witness: With these overheads on it, because I know it can't be constructed without them any more than it could be constructed without labor.

Chairman Geiger: But a little bit ago, you said you considered only the physical property?

Mr. Mullin: No, the condition of the physical property.

The Witness: I said in addition to the physical property, I considered the earning statement.

Mr. Mullin: Let us get the question and answer.

Chairman Geiger: The condition of the physical property?

The Witness: Yes, sir.

Chairman Geiger: That is all right, but that still has

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[fol. 611] nothing to do with the overheads that were necessary to establish the property some twenty-five or thirty years ago. All of your gas companies probably or a large part of them at least, have been the development of years, started probably when you could get and distribute gas at 10 cents a thousand feet or when gas was first discovered. Of course, there may be some more recent ones, but you run across a great many of those.

The Witness: Well, 27 cents is about the lowest I have had any experience with.

Chairman Geiger: Well, you look at the plant and its condition, the physical plant and its physical condition of the plant and income and the expenditures. Now, as a purchaser, that is all you are concerned about, isn't it?

The Witness: Perfectly true, but I know that physical plant has buried in its cost of construction these overheads that are here included.

Chairman Geiger: I see. Now, let us go the other way out. Now, suppose you wanted to go out and sell a plant, you make up an inventory and the person to whom you sell that plant pays no attention to those overheads or anything; he does exactly what you do if you were the buyer; he looks at the physical condition of the plant; isn't that so?

The Witness: He does, exactly——

Chairman Geiger: And anything——

The Witness: Wait a minute. I don't want you to put words in my mouth.

He does exactly what I do which is to consider the physical plant with the overheads.

Chairman Geiger: Well, he just puts the overhead in as

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[fol. 612] a lump amount; he don't try to segregate it and separate it?

The Witness: He don't get that careless with those sums of money, I don't think.

Chairman Geiger: Well, very well. What we are trying to clear up in our mind is this:

Assuming there is an allowance to be made for either going concern value or attaching business or good will or whatever you may wish to call it, how are you going to find out what that is worth? Is it the reconstruction value of what it took to attach it in the past or what it would take to re-attach it to a new concern?

The Witness: Its value to us is what it would cost us to produce it now. It may have cost the other fellow half as much or it may have cost him four times as much, because of poor management, but its worth to us is what it would cost us to do it.

Chairman Geiger: Well, now, I am glad to get definite on that, that means that as far as whatever value attached to a going concern value is what it would take to produce it under the present existing conditions?

The Witness: Yes, sir.

Chairman Geiger: And do you depreciate that amount at the same rate that you depreciate your property?

The Witness: No, because that depreciates itself, I mean when you lose a customer, he just goes off the books and he depreciates himself when you come to count your customers.

Chairman Geiger: So you found the value of this plant as a going concern as of a date certain—the date certain here is when?

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[fol. 613] The Witness: June 30th.

Chairman Geiger: June 30th?

The Witness: Yes, sir.

Chairman Geiger: 1929. Now, we have got to find then what that plant is worth as a going concern as of that date. Now, we theoretically are reconstructing the physical portion of the plant and take the depreciation and take into

consideration the overheads that they think are fair and then we endeavor to reconstruct the feature which is the going concern in it, and in your judgment, we should fix the value of that as what it would cost at this time to do it.

The Witness: To reproduce that business; that is the only basis on which I know how to arrive at the value of anything.

Chairman Geiger: Well, don't take this down.

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Mr. Mullin: If the Commission please, you have asked questions and he answers that question and if you have it in the record that will disclose the question and if you haven't it in the record you are yet acting upon the answer that he gives.

Chairman Geiger: He will give it in his answer.

The Witness: I would give that——

Mr. Mullin: Just a moment, before the answer goes on the record, we would like to have the Commissioner re-state the question.

Chairman Geiger: Back up, Mr. Stenographer, if we are going to be that technical about it.

Mr. Mullin: I am perfectly willing when you re-state it to have the witness answer it.

Chairman Geiger: I am trying to save the stenographer

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[fol. 614] a little bit, don't put this in that we are talking here. If you were going to sell a plant that you had for sale, you would stress certain features of it to your prospective customer would you not?

The Witness: Yes, sir.

Chairman Geiger: Would that in any way include any reference to or reference to this going concern value of it as to what it took to produce the going concern value?

The Witness: I would stress it if that cost of producing it had been low; if it had been high, I would try not to call attention to it, because what he is going to pay me is value, and he would not be attracted into buying into a situation where the cost of getting business was high.

Chairman Geiger: Well, but his business is complete, the estimate is already intact.

The Witness: Yes, sir.

Chairman Geiger: It does not concern him whether or not in the original establishment of that business it was easy to persuade those people to take gas or difficult to persuade them or whether the company in attaching business used extravagant methods or economical methods. The thing that he looks at are how many are attached there and what kind of people they are and what kind of territory he has, and what the physical condition of the plant is.

The Witness: That is true. He would look into the cost of attaching business because communities widely differ in the average wealth that those people have. For instance, we never will in Denver sell as much gas per customer, as we will sell in Kansas City. There are too many people in

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[fol. 615] Denver for their health, living in snug apartments, and on very small incomes. The cost of getting a thousand feet of additional sales in Denver will always be higher than the cost of getting that same amount of business in Kansas City or St. Joe or Columbus for instance.

Chairman Geiger: Well, naturally one buying a plant would look to the compactness of the city, would he not, whether or not they could make many connections in a short distance of distribution pipe?

The Witness: Yes, sir.

Chairman Geiger: Or whether they had to be distributed over a large territory in order to get a customer, that would all depend——

The Witness: We would also and they would also if it were a gas property be very much interested in the number of apartment buildings, because the apartments, the occupants of apartments are very poor gas customers. They don't need any for heat, from the standpoint of heating their home, and they don't use any for hot water, because it is furnished with the apartment.

Chairman Geiger: Take a bath?

The Witness: They take their bath, but they do it with water heated by coal in the basement; they do not buy gas of the company to heat it, and the apartment house furnace is a very poor gas customer.

Chairman Geiger: Well then, you would also take into consideration the climatic conditions, the gas company delivering gas for fuel purposes might or might not sell more to a company, or to a community in the south, in pro-

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[fol. 616] portion to their population than in the north. I can see that it might be so when in some parts of the north that you couldn't use gas as a fuel all winter long, therefore you come in competition with coal, and I can see that in the south you might have a milder clime in which you could use it for fuel purposes all the year and thereby sell more gas, but whichever way that worked out, you would take that into consideration.

The Witness: He would take into consideration, too, Mr. Commissioner, if you will permit me—the conditions are the reverse of what you stated in Calgary and Edmonton and in places where you find natural gas, the average sales are twice as much as anywhere that we know anything about in this country because of the temperature.

Chairman Geiger: Well, I just took that. Therefore, you would consider climate?

The Witness: Yes, sir.

Chairman Geiger: So that he don't buy and sell a gas company on the cost of reproduction less depreciation?

The Witness: That is the only thing he can earn on.

Chairman Geiger: How?

The Witness: That is the only thing he can earn on, and if he earns anything above that, it will be taken away from him and you bet he gives it consideration.

Chairman Geiger: Well, if he is buying a gas company in Calgary, Canada, if he is going to be able to sell twice as much gas with a given amount of pipe that he could in Mobile in this country or any other place down in Florida or something of that sort, it certainly would be worth more to him, wouldn't it?

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[fol. 617] The Witness: Not one single cent more for the simple reason that he has got regulation there as he has here, and if he sells it as such, he will sell it for the average price because his earnings are limited.

Chairman Geiger: Well, but that might well result in this, with the distribution plant. By charging so much, that his margin of profit above would be entirely wiped out, would it not? Suppose you have to pay 45 cents down in Alabama for gas delivered at the door and you don't sell a lot of it, then you can charge a higher rate for it?

The Witness: You have to.

Chairman Geiger: Yes, or in Calgary, you don't charge as much?

The Witness: No.

Chairman Geiger: But you think that the thing that he always has in consideration, no matter where the company may be located, or under what conditions attaches, he has ultimately to look at the value of the property through the method of theoretical reproduction in order that he may get a fair return on it?

The Witness: But the reason for that is this: Myself and my associates are representatives of a big group of stockholders and our duty is to earn the most on the money that that company has, that we can. Now, if we can find a place where we can go and build a new property and build it for less than he is willing to sell us this property, why, of course, that is the way we would go. If we can find something that we can buy for less than our cost of reproduction of a similar property, why we would buy and that is the test, what is the alternative of spending money

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[fol. 618] here or we spend her- or there or somewhere else, because every company or anybody with any money always has about fourteen projects presented to them to one that they have got money to go into it.

Chairman Geiger: One of the other things you would carefully consider, too, I have no doubt, is the temper of the Public Utilities Commission in the particular state and of the proceedings of the Supreme Court in that state.

The Witness: Yes, sir, and some of their other laws, too.

Commissioner Bricker: This may be stretched extraneous to the issues here in discussing—the decisions of the courts of our state. In your judgment would the prudent investment theory for the fixing of rates stabilize the Public Utility Industry or the rates for the service?

The Witness: No, it would raise the cost of getting money for this reason, with all due respect to this Commission and the Supreme Court: Were I to come in here and prove I invested ten million dollars in this electric company in this town, I would not care what you decided when the Westinghouse came along and offered somebody to duplicate the plant for five millions; you could not protect me, and you could not make the customers buy of me on a ten

million dollar rate basis when the property could be reconstructed at five million, so your protection is no good that way—the prudent investment theory only works to the detriment of the company. On the prudent investment theory you can keep us from raising our rates when the cost of reproducing our plant becomes double what it was, but you can not protect us a bit when the cost of reproduc-

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[fol. 619] ing our plant becomes half what it was, and of course it was in Smith vs. Ames that established the cost of reproduction new valuation after there had been a period of declining prices for 30 years, for the purpose of cutting the rates in Nebraska—and that was the object of establishing the cost of reproduction basis, since the present curve, since 1906 has been going up, they do not like it so well, but the prudent investment theory can not be enforced by you or by the Supreme Court when the prices go down.

Chairman Geiger: Unless there are other protective statutes.

The Witness: It can not do it. John Jones has a plant out here. When somebody shows him how to build his gas plant—and these small gas plants are built in small units—show him how to build it so that his fixed charges and with reduced investment and his operating costs are less than what we will ask him for it, you can not stop him from doing it and neither can we, and we will meet competition or go out of business so that prudent investment theory goes right out the window on declining prices and can only be enforced in better or higher prices.

Chairman Geiger: You are quite right if John Jones is going to purchase a plant at less than this, he may come into the same town where you spent a large amount of money, but the theory back of prudent investment with sole, controlled monopoly is right, let him come in.

The Witness: Now, let me call your attention to just one thing on this discussion: Do you recall the wave of municipal ownership over this country? You will find if you

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[fol. 620] look back and compare the time when they were building so many municipally owned plants that it was done after prices had been declining for 30 years, and the utility operators were enjoying rates that had been established on the basis of the original cost of their plant, and

when the court would not set aside those contracts prior to the establishment of public utilities commissions that could abrogate those rate franchises, the public went into the business of supplying themselves with gas and with electricity, and they did it for just that reason, and there was no way of stopping the city from building its own plant and they did it. Your prudent investment theory is nothing but a theory except at a time when they can gyp companies with it; the rest of the time it won't work.

Chairman Geiger: Well then, regarding the question on the question of going concern value, you would not consider the present value of your going concern value, of the money you had put into it to develop it because that would be prudent investment.

The Witness: Yes, sir.

Chairman Geiger: And not going concern value, and you would consider what it would take now to reproduce——

The Witness: Could not reproduce it if it were nonexistent.

Chairman Geiger: Well, now, to get your opinion, suppose there is a community—I think maybe you have answered it on that, possibly not—suppose there is a community which is accustomed to the use of natural gas as a fuel; theoretically you obliterate your natural gas plant and theoretically you re-establish it; now, are you going to

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[fol. 621] have the trouble and cost of attaching those old customers to your new plant that you would have if they never had used natural gas, had the coal stoves and coal furnaces and everything else that they were accustomed to use.

The Witness: That depends entirely on whether they have had good service or poor service; if they have had good service, you would have less trouble; if they had poor service you would have more trouble than if they had not had experience at all.

Chairman Geiger: Well, let me ask you one question because you are intelligent: The law permits that we consider the cost of reconstructing the physical plant and then that we shall put a depreciation upon it to ascertain its present value. By what stretch of the reasoning can we say that that law written for that purpose would permit us to reconstruct the mental condition or the degree of

education, either of the employee of that plant or of the people who were going to use the property?

Take the employees of the plant, will you say that it is proper to consider how much it would cost to make a skillful employee? Why, there is no limit to that, is there, because you might have to go back and find out how much is required to run the Boston School of Technology or some other thing that produced the education of the employee which you engaged in your service. How can we really do that? You don't consider that at all, do you, when you are buying and selling a plant?

The Witness: Yes, we do—very serious consideration is given to the type of operation; that is very necessary, that we can take a property over and feel satisfied from the

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[fol. 622] basis of past performance that the group of men that comes with that property are fit to continue to run it satisfactorily for us. We would much rather have it than to have to go through the process of taking our men that are now elsewhere and disturbing our organizations, plucking a man out here and there and trying to put that group together and cut and try until we get an organization that would function in there.

Chairman Geiger: Still——

The Witness: One of the—let me interrupt——

Chairman Geiger: There are always available men who will meet your requirements that can be placed in a plant that has not been satisfactorily run.

The Witness: There are, but we choose them from within our own organization, because none of us are smart enough to pick out a man with whom we are not familiar over a period of years—and pick all good ones. We pick some lemons when we start picking outside of our organization from time to time and we have to go through that discarding period.

Chairman Geiger: You want the rate-payer to pay the cost of educating the lemons, do you, as you call it, in the original business?

The Witness: Because he gets the benefit of the reduced operating expenses that that elimination produces.

Chairman Geiger: Well, of course, you don't give us any evidence where there is any such cost elimination; you say that you have a more gracious organization that meets the

public and gets the rate with less protest from the public and gets a little higher rate than the other, because they are good salesmen, but that don't mean in the producing
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[fol. 623] of gas or distributing the gas, any better; the rougher sort of an individual, who is constantly antagonizing the public that he came in contact with, might be better to lay pipe or place a meter.

The Witness: You are putting consideration on only the few people who come in contact with the people, whereas the real cost of an organization has to do with this same cost engaged in the group that lays pipe; getting the party, the fellow that will do it, getting the sort of a fellow that will get up at any time of the day or night and give service.
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[fol. 624] Redirect examination.

By Mr. Mullin:

Q. Mr. Hamilton, a little while back in your examination, you said that if you were going out and buy a property, first thing you would consider would be the physical condition of the plant; after you ascertain that, how would
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[fol. 625] you determine the value of that plant?

A. Well, I would determine both at the same time, at the time the inventory was made. I determine both the value of it from a cost of reproduction new, and I would make the necessary inspection; I would have the depreciation and would have the present condition of it.

Q. Would you include in the valuation all of the items that you have discussed, cost of financing, going concern value and all of these other items if you were gong to buy a company?

A. Yes, only in the one case that I cited, just the physical property; I did not get their financial set-up; I did not get their charter and knowing of course, I removed that portion because we had again to go through that performance.

Q. One of your answers as I heard it, might be considered as meaning that you thought going concern value was a matter of cost of attaching consumers only; is that correct?

A. Oh, no, that is only just one item of it.

Q. May there be a going concern value to a company, utility or otherwise, without any cost having produced the business or so forth?

A. It is rather hard to concede we know that all of its going value has not cost something, but there are certain favorable locations where the items of that kind cost nothing in the way of an out of pocket expenditure and yet are very valuable.

Q. A part of going concern value?

A. Yes, sir.

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[fol. 626] Chairman Geiger: Well, now, assuming that there has been a division in this matter and that we have an item of $155,000.00 set aside as going concern value.

The Witness. What is it—$125,000.00.

Chairman Geiger: $125,000.00, and your going concern value, $125,000.00 is assumed, and that is only the assumption because I haven't any idea what it would be, but assuming that 75 per cent of the assets of the company belong to the electric distribution and 25 per cent belong to the gas, then would you say it is justified in taking one quarter of the entire overhead and allocating it to the gas end?

The Witness: No, I don't believe it would because my experience has been that it costs a little less to develop the electric customer than it does to develop the gas customer, because a large number of the electric domestic customers

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[fol. 627] use it because through the appliances that are in the building when he moves in; you don't have to sell him a lot of equipment to use the normal amount of electricity; the wire is in the building and it is all there so that it costs less to attach an electric customer than it does a gas customer, so far as the domestic is concerned. When you get over into power customers then of course its costs you much more.

Chairman Geiger: But for the sake of figures assuming that that property in the Dayton Gas & Electric Company is 50 per cent for gas and 50 per cent for power and electricity, then you would not say that the overheads should be divided 50-50 between the two?

The Witness: No, I think you would have to take up each overhead by itself as it is; for instance, engineering would not divide on that basis, on the basis of dollars of

the two; the gas would take more engineering in proportion to the number of dollars than the electricity would, so far as the plant is concerned. In new business, the gas would take more than the electricity reversed.

Chairman Geiger: Engineering superintendence during construction five per cent for distribution system; would the electric portion also bear five per cent of its proportionate value?

The Witness: With the exception of the big units, it would.

Chairman Geiger: I see. All right. Oh, just one more question, please. Would you make an estimate whether or not considering that the single organization supplies or runs two different public services, one gas and one elec-

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[fol. 628] tricity, as having any bearing upon these overheads; would it be easier and cheaper to run the two together than to run two of them as separate units?

The Witness: It does not make much difference with the exception of the competitive feature, which, of course, between two departments is not as vicious as it is between two different companies.

Chairman Geiger: No, one would not take the part of selling gas service as against electricity for heat?

The Witness: Well, I mean the boys down the line will all the time if they have a chance, but there is somebody sitting up ahead who don't let them do too much of it. The various departmental men stand on their results in their own department, after all.

Chairman Geiger: You testified yesterday or today either a definite figure, $14.00, as I recall it, for attaching every new customer.

The Witness: I said approximately that amount, yes, sir.

Chairman Geiger: What items make up that?

The Witness: I have made that up on the basis of two or three different studies.

Chairman Geiger: Can you give us the elements of that $14.00?

The Witness: Those amounts came from the total net expense—or the next expense of our new business departments, and by net, I mean after the new business department had been credited with such profits as they made on the sale of appliances; and ran about 20 cents for each

thousand feet of annual sales—19 cents in one case; 22
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[fol. 629] cents in another—on other and smaller towns where I have not attempted to figure it out on the basis of cents per thousands for the sales, they have averaged from ten to twenty dollars; where we have run through a brand new territory as we are running a pipe line now to Springfield, Missouri—in those smaller towns, it would run more. I mean, there is automobile hire for your salesmen and there are things of that kind that you do not have when he is walking a beat around Columbus here. It has been based on our actual experience which takes in the cost of advertising at this time, the cost for instance, if you are going to sell a man a furnace——

Chairman Geiger: Well, what I was going to ask——

The Witness: You have got to go and make a survey of his house to tell him what kind he wants; he don't know.

Chairman Geiger: Would you charge that in as attaching business?

The Witness: Yes, it is part of the cost of selling him that business.

Chairman Geiger: Would you credit all service with the profit you made on the furnace?

The Witness: Yes.

Chairman Geiger: That is, if you went down and sold a furnace to a man on which you made $50.00 and thereby attached a gas burner to him, you had really made a profit on attaching the appliance beside of selling the gas, didn't you?

The Witness: That is true, but because our object is to sell gas, we endeavor to cut the profit which we make on the sale of appliances, as much as we possibly can, in order to get them in faster. Our business is selling gas and the
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[fol. 630] big investment under me is in our system.

Chairman Geiger: Well, isn't this true, wherever you get an attached customer who burns gas in the furnace which you sell, you have made more money out of that furnace than it has cost you to attach the customer.

The Witness: Very seldom because we would rather not have that profit and get him to buy it so much earlier. We are not a merchandising organization. We do not expect to make any money out of the range we sell. We have most

of the time to sell merchandise, but our job is to sell gas and sell electricity.

Chairman Geiger: You said you sold fourteen million dollars about of merchandise in a year.

The Witness: Yes, sir.

Chairman Geiger: Quite a considerable sum. You do it on a margin that nobody else could do it on because you make up your losses which you ordinarily would have had if you had to sell it at a price which you do sell, by putting up the price of the gas, which you burn in the appliances which you sell.

The Witness: Put it the other way around: That we are successful in selling appliances and getting to selling gas, then we can cut the gas rate, whereas, if we sit still and let the consumption of gas drop down, then we have got to raise the price of gas exactly as happened in Kansas City, as for instance, the U. G. I. sat there and were proud of the fact; they were making money out of that plant, it seems, and proud of it, but their sales of gas in the year 1926 showed they needed their increase rate, and they were going to the Commission and ask for 97 cents—an increase—and they could have proved their case. We went in and

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[fol. 631] sold a lot of appliances; it cost us money, but we doubled pretty nearly the consumption of gas per customer without doubling our expense, and we cut the rate to 86 cents.

Chairman Geiger: But, nevertheless, in your merchandising transactions, you put both your profit and loss, whatever it may be, in the expense, into your entire net income, did you, for operation from the sale of your products as a utility, and if you have made a loss, or lost money upon the sales of your merchandise, the public has to make that up to you by way of rate.

The Witness: That is true, if we were going to ask for an increase, but we have gone through this performance, that is true.

Chairman Geiger: Thereby the individual, independent merchant has not very much show against a utility selling in his own field.

The Witness: He has a good show if he handles good equipment of the high type—he has just as good show as we have; but we do try to run out of business, poor, cheap

and inefficient equipment, and we have to do it in self defense, because when it lands on our line, we get high bill complaints and trouble.

Chairman Geiger: All right.

By Mr. Mullin:

Q. In your judgment, what is the amount of the going concern value of the Dayton Power & Light Company as to the gas plants involved in this proceeding?

A. I think it is a very minimum of $10.00 per customer for the customers that are attached and that is for the gas end of it.

Q. I mean just the portion of that appearing in this case?

A. Yes.

[fol. 632] JAMES A. EMERY testified:

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[fol. 633] Q. Mr. Emery, what do you understand going concern value to be of a company such as the Dayton Power & Light?

A. In considering and estimating the going concern value of the property in question, I have followed the definition that takes the element of value in an assembled and established plant doing business and earning money, over one not thus financed. This element of valuation is as necessary to produce the plant in the service of the public as any part of the physical property.

Q. Mr. Emery, will you please go ahead without detail questioning and tell us what your judgment is as to the going concern value of the Dayton Power & Light Company as to the plants involved in this proceeding. How you arrive at it, what the elements are and so forth; take it up please, so as to save time; you want to get away tonight as I understand it.

—. Yes. In making this estimate, I have——

Q. Another thing in that connection: Determine and explain any allocation that you may have made.

A. In making this estimate, I have generally confined myself to those elements of going concern value which cost the company money and I have not included anything arising from fortuitous circumstances. My estimate is first made for the gas division of the Dayton Power & Light

Company as a whole, that being a distinct going concern, rather than for the parts that are under consideration at this time. After making such an estimate for that division

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[fol. 634] of the company, I have made what I consider to be a true allocation to the property under consideration.

Mr. Rush: Pardon me, may I interrupt just to get clear in mind: Did I understand the witness to say that you made an estimate of the entire company taking into consideration the electric side and the gas side and then allocated to the gas or did you confine your estimate to the gas alone?

The Witness: To the gas alone.

Mr. Rush: To the gas alone?

The Witness: Yes.

Mr. Rush: Then what do you mean, by you allocated it to the property in question, which is all—what do you mean by that?

The Witness: The property in the eight towns that are in consideration.

Mr. Rush: Oh, you mean you allocated all of the company's—I see.

The Witness: Or rather to the towns as a whole. In building up this estimate, I have considered various items entering into going concern value and have made an estimate for each of them.

Taking our property that has just been finished and ready for operation, it is first necessary to recruit the employees. That is not by any means a simple matter of taking them——

Chairman Geiger: Suppose you give your per cents on these, the per cents that you have to recruit employees, what per cent?

The Witness: Well, I have the sum of $150,000.00?

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[fol. 635] Chairman Geiger: $150,000.00; well, that is more than your whole going concern for the whole thing.

The Witness: Well, that is for the whole gas division of the Dayton Power & Light Company.

Chairman Geiger: All right, $150,000.00. All right.

The Witness: The next item, attaching business, $429,000.00.

Chairman Geiger: $429,000?

The Witness: And the next item, adjusting or seasoning the physical property, $50,000.00; the next item, unification value, $250,000.00, total $879,000.00.

Chairman Geiger: Unification what?

The Witness: $250,000.00.

Chairman Geiger: Well, what do you call unification of value?

The Witness: Yes.

Chairman Geiger: All right, now, you may explain what the various things are; what did you have, 879?

The Witness: $879,000.00.

In determining the value of attaching the personnel, I have obtained a list of the executives, semi-executives and a statement of the total number of employees of the company. In recruiting such a large force, there are two means that can generally be pursued: One is to go out and take on men that are already free, but the difficulty with that is that generally-speaking, all good men have got jobs, so that to get good men, you have got to go through a long process of training or selection, trying out first one and then another, or you have got to hire a man away from

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[fol. 636] some other job, and that is not always satisfactory.

Chairman Geiger: Now, you go on the assumption that during the period of theoretical reconstruction, that that whole organization has been dissipated and cast to the four-winds of Heaven?

The Witness: Oh, yes.

Chairman Geiger: And are not theoretically any more available——

The Witness: That is, I build up that part of the property of the company just as I would lay the mains in a case——

Chairman Geiger: You say considering the number, how many are there?

The Witness: 1024, as of the date of this survey.

Chairman Geiger: That is for all properties of the company?

The Witness: For the gas division.

Chairman Geiger: For the gas division?

The Witness: Yes, sir.

Chairman Geiger: Oh, yes, recruiting was $150,000.00, covers everything.

The Witness: Covers everything, yes.

Chairman Geiger: About how many are there altogether?

The Witness: Including the 20 executives and semi-executives, 1044.

Chairman Geiger: 1044 for both divisions, both departments, gas and electricity?

The Witness: For the gas division.

Chairman Geiger: How many of these you are allotting

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[fol. 637] to gas.

The Witness: The thousand and twenty-four, under the grade of executives, are all in the gas.

Chairman Geiger: Do I get you right that the total number attached to both of these departments, gas and electricity, is 1044?

Mr. Matthews: No, that is not what he said.

Mr. Mullin: When he said, "all together", he me-t in the gas division.

Mr. Matthews: Well, he did not say that.

The Witness: I misunderstood your question; I thought you asked me to take together the gas.

Chairman Geiger: How many are there all together in this gas-electric?

The Witness: I don't know.

Chairman Geiger: You do not know; well, how do you know how much to apportion to the gas?

The Witness: Well, I have secured a statement from the gas division of the company.

Chairman Geiger: All right, all right.

The Witness: In estimating the value of the executives attached to the company, I first ascertained that 40 per cent. of their time and salaries are allocated to the gas division, so that 40 per cent. of the average salary of these men amounts to approximately $2,500.00 per man. In assigning a value to those men, I have particularly had in mind my own experience in hiring and training men, and I have considered the methods followed by insurance companies, in the insuring of executives in order to protect corporations against the loss of services. Such insurance runs from

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[fol. 638] two to five times the annual salary. I have taken

it in this case—I have taken the value at two times the annual salary, that is $5,000.00 per man, and on that basis, I estimate the value of the executive personnel of the gas division at $100,000.00.

Chairman Geiger: Four hundred?

The Witness: $100,000.00.

Chairman Geiger: One hundred.

The Witness: The one thousand other——

Chairman Geiger: Now, wait a minute, you estimate the value of these people to the gas company as of $100,000.00. Well, now, there, what has that got to do with attaching them and gathering them in and employing them? Do you mean it is going to cost that value to the company to have secured their service?

The Witness: Generally, in the end it costs that much to get men of the proper character.

Chairman Geiger: Do you mean to come here from New Jersey and tell us that it is going to take $100,000.00 to employ 24 men?

The Witness: Well, I think I have stated with respect to that.

Chairman Geiger: Well, is that what you are telling?

The Witness: I don't think I said that, if you will excuse me——

Chairman Geiger: Well, what was it?

The Witness: I think I said I estimated that as the value of the executive personnel of the company.

Chairman Geiger: Well, I know, but what has that got

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[fol. 639] to do with the value of attaching business—it cost $100,000.00 to attach these to the business of selling gas.

Mr. Mullin: That is the first item, Your Honor, of attaching business; it is their personnel.

Chairman Geiger: Well then, it is going to cost $100,000.00 to this company to hire 24 men to run a gas company?

Mr. Matthews: Oh, not to hire them; to get them.

Chairman Geiger: Well, to get them.

Mr. Matthews: Well, to get them—there is a difference between hiring and getting them.

Chairman Geiger: All right, go ahead.

Q. Go ahead.

A. Now, with respect to the men under the grades of executive, they are all, with the exception of street labor, generally of the nature of skilled labor, and even in the case of the street men, it is necessary to maintain a force of well-selected and tried men; they must be available at all times, and particularly, they generally work in small gangs, so that it must be known that they can be depended upon. This means a very careful process of selection; it means trying out men, a number of men, before the right one can be obtained.

Based on my experience and information that I have obtained from time to time in that particular, I estimate the value of these men, as so selected and trained, to the company, at $50.00 apiece. That means a total of a little over $50,000.00, but I have called it $50,000.00, which gives a total of $150,000.00 for the value of the attached personnel.

Q. The next item is attached business?

A. In estimating the item of cost of attaching business,

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[fol. 640] I have chosen in this case, to make the estimates by the thousand cubic feet of gas added to the deliveries of the company. Very little was spent by the company, or at least entered in its accounts, for new business, up to the year 1926, when apparently a new policy was adopted with respect to new business. In that year, $19,274.00 was spent. In 1927, $69,262.00, and in 1928, $121,805.00.

Briefly speaking, I have divided these amounts by the thousand cubic feet of gas, by which the company has increased its consumption, and have obtained an average cost of eight cents per thousand which I have applied to the total gas consumption of the company, and obtained the figure of $429,000.00 as the cost of attaching business.

I am sure that this estimated cost of attaching business is very low. In the first place, the amounts spent as reported do not include any overhead allowances. In the second place, the result as I have obtained it, figures to only a little more than five dollars per customer, and in my experience the cost of attaching customers is generally on the average very much more than that. As Mr. Hamilton stated it often runs as high from fifteen to eighteen dollars per customer. However, I felt it proper, in order to be conservative in this case, to base this estimate on the actual experience for these three years.

Chairman Geiger: Well, now, taking the experience of the three years, how do you know that amount of money was spent for connecting that much business? You found the money expended; do you know whether it was expended in an attempt to extend their gas service?

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[fol. 641] The Witness: Well, the amount of new business would indicate that it was spent to extend their gas consumption; the gas deliveries, either by obtaining new customers or by increasing the consumption per customer.

Commissioner Bricker: Have you copies of any advertisement that was carried on?

The Witness: No, that would be included in these expenses.

Commissioner Bricker: Well, do you know whether that included any advertising of equipment and merchandise?

The Witness: I do not.

Commissioner Bricker: Do you know how much might be reflected in the additional consumption of gas by those who were already on the line?

The Witness: I do not, but may I elaborate that answer?

Commissioner Bricker: Yes, sir, indeed.

The Witness: But as I see it, if there were gas which came on without solicitation or effort, then the gas obtained by the new effort would have cost more per thousand than the figure I have estimated.

Commissioner Bricker: Of course, the reverse of that is true, too, if it did increase the consumption; you are just carrying my question, if it did increase the consumption of those who were already on the line, there would be an additional benefit beyond the number of subscribers who were added to the old subscribers.

The Witness: Well, it may be that I didn't understand that question. I think——

Commissioner Bricker: I ask if you know—pardon me—

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[fol. 642] I asked you if you knew the percentage of the advertising which was reflected in the increased use of gas by those who were already subscribers.

The Witness: No, I do not.

Commissioner Bricker: It would likely result in an increased use, would it not, by those who were already on the line?

The Witness: Oh, yes.

Commissioner Bricker: And in figuring your eight cents, you only took the amount of gas which was consumed by the new subscribers?

The Witness: No, I took the entire.

Commissioner Bricker: Increase in output?

The Witness: Yes.

Commissioner Bricker: Well then, that would cover the total increase then by the old subscribers as well as new subscribers?

The Witness: Well, I must ask you pardon; I thought you asked me for the specific proportion. Of course, the amount due to the advertising would be reflected.

Commissioner Bricker: In other words, when figuring your eight cents, you took the total increase in gas consumed?

The Witness: Yes.

Commissioner Bricker: And not the increase that was consumed by new subscribers alone.

The Witness: That is right.

Now, my next item is for adjusting and seasoning the physical property. This, just to explain it briefly, is best illustrated by the settling of the fills of the railroad com-

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[fol. 643] pany. In the case of a gas company, there are similar items of expense developed on account of settling of the ditch and paving, leakage which developed and troubles which, particularly developing when the frost comes out of the ground in the first year. There should also be taken into consideration in this account, the fact that whenever a city improvement, city street improvements are made involving changes in grade or changes in sewers, the gas lines often have to be raised or lowered, whether the time has come to renew them or not. That is, these changes have to be made before what might be considered the normal life expectancy of the mains in question. These expenses generally occur or often occur in extraordinary amounts, and in the case of an old property, that is, in a settled city, more of them have been performed than would be the case of new construction; that is, a larger percentage of such adjustments will have been made and less adjustments of the kind will have to be made in the future.

We have made extended studies of the cost of such work as this in other places, and I have made some study here, but the data is only available for a few years back, and I have therefore, in order to be conservative made what I consider is a low allowance for that element of adjusting or seasoning the property, namely $50,000.00, which is in the neighborhood of one-half of one per cent.

Commissioner Bricker: This seasoning of the property that you mention—all this follows after the operation begins?

The Witness: Yes.

Commissioner Bricker: And is charged to maintenance?

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[fol. 644] The Witness: It is usually paid—it is often paid in maintenance, but in some cases——

Commissioner Bricker: It is rated as an expense item, is it not, in rate cases?

The Witness: I think it often is, yes, but it is often capitalized, also.

Commissioner Bricker: It would not be both, would it?

The Witness: No.

The next item is that of unification of value in the amount of $250,000.00. This is the item of value that inhers in this property, because it is a part of a large property. It is of value to the owners; it is an element of value to the owners; it is an element of value in cases of purchase and sale and it corresponds to the additional cost of assembling the body of land. This item is fully justified with respect to the public, because by such a unification or bringing together of properties, substantial savings in cost of service can be made.

Commissioner Bricker: If that is true, at the time of the consolidation then, or at the time a big company should take over the local distribution plants, there should be a reduction in rates, should there not?

The Witness: After the economies effect by the consolidation are brought into play, it certainly would be taken into consideration.

Commissioner Bricker: And the public will have the benefit of the reduced rate, if that theory is proper? Do you know of any place where that has worked out?

The Witness: I don't recall offhand any specific places

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[fol. 645] that we can name, but I think it is a matter of common occurrence, as a matter of fact in effecting consolidations or unifications, they are always made through trades, purchases and sale and in the necessity of reconciling the various interests, just as in the case of bodying-up land there is always some extra expense on this account, acquired. I have gone into past records of companies, where they have been available, and have found many cases where they have amounted to very large percentages of cost of the physical property. In this case, I have estimated for this purpose, for this element of value, $250,000.00.

Q. Which makes a total of how much, Mr. Emery?

A. Making the total of $879,000.00. I would like to add with respect to the $250,000.00, that to justify it as a public matter, only a very small percentage of saving of operating expenses would have to be made—not over one per cent. That, of course, would be realized through the management purchasing and also place the company in a position to obtain new money much cheaper.

Considering the property in the eight towns, I find that in the eight towns there are one-sixth of the meters of the gas division of the company; there are one-fifth of the mains and one-fifth of the gas deliveries are made in those towns. In order to introduce an element of conservatism, I have taken one-seventh of the total estimated going concern value of the gas division as attached to the property in these towns, this one-seventh being approximately $125,000.00.

Q. Mr. Emery——

Chairman Geiger: Now, are you going off to something

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[fol. 646] else?

Mr. Mullin: No, I want to ask him some questions regarding this.

Q. In making an appraisement or an estimate of the cost of reproduction of such property, would it be complete without allowing a substantial element for going concern value?

A. It would not. In my opinion, those—well, I don't think it is a matter of opinion, certainly, a property that

has just been completed, and is cold and dead is far different from one that is in full operating personnel. It takes steam to get the wheels moving forward.

Q. Is this valuation made for utility purposes only or is it the same kind of value that is made in commercial transactions outside of the ultility business for purposes of purchase and sale and so forth?

A. It is the same kind of a consideration except that I might add that in an outside business, consideration is also given to two matters outside of these, relating to earning power.

Q. In such valuations generally, that is values of property both in the utility business and outside, all of these elements that you have mentioned are taken into consideration are they?

A. Yes, sir.

Q. What can you say as to the methods which you have used for determining going concern value, being made according to the usage of the business generally for such purposes, or have you determined the amount in accordance with usages and general customs of business, in other words?

A. Yes, it is the method that has been used for a long time in our office and corresponds generally to the method used in other offices of the same kind.

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[fol. 647] Q. Mr. Emery, I wish you would explain whether or not the various items that you have listed, that is, attaching an efficient personnel, attaching new customers and so forth, seasoning the plant and the unification, in any manner work to the benefit of the consumers; if so, how? Take up the items separate, if you will?

A. Well, of course, the property would not be of any use *of* the consumers at all unless personnel were attached to it. It takes men to run it to furnish the service.

Q. If you have a well-trained and efficient personnel, men who understand their various lines of business, what is the effect of that on the operating expense and the efficiency of the service rendered, if any?

A. It has a direct bearing on the cost of service.

Q. Lessens it?

A. In making it always less.

Q. What can you say as to the attachment of new customers; what effect does that have upon existing consumers so far as benefits to them are concerned?

A. The greater the density of business—the more business that is done and the better the load factor, the better it is for all consumers, in that there is more possibility of the rates being reduced.

Commissioner Bricker: That has not happened in this case at all, has it, — any instance?

The Witness: In the Dayton Power & Light Company?

Commissioner Bricker: Yes.

The Witness: Not to my knowledge.

Commissioner Bricker: Their increased consumption and the number of new subscribers about which you testi-

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[fol. 648] fied a moment ago has not in any way reacted toward a lower rate?

The Witness: No. May I add something?

Commissioner Bricker: No—the fact—the result of that has been that you are here asking for an increased rate?

Mr. Mullin: Because the rates are not sufficient.

The Witness: May I add something to my answer?

Commissioner Bricker: Certainly.

The Witness: I said that, but if the company did not have an efficient personnel, I think they would undoubtedly come here with higher operating expenses which they would ask you——

Commissioner Bricker: Asking for a higher rate then, more of an increase?

The Witness: Yes, sir.

Q. Let us get this straight, how many consumers were added during that period that you spoke of, Mr. Emery—29,000?

A. I don't believe I have got the data as to the number of consumers increased.

Q. Increased from fifty thousand to seventy-nine was it not; do you have that figure—I believe you have it.

A. (No response.)

Q. Was there a substantial increase in the number of consumers?

A. Yes.

Q. As well as in the amount of gas consumed?

A. Yes.

Q. In any rate proceeding, then the revenues which the company received would be larger than they were before, would they not?

A. Yes.

Q. Under the old rate, or any rate?

A. Due to the added customers.

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[fol. 649] Q. The total?

A. Yes.

Q. And consequently, there would be in the rate proceeding less reason for increasing rates under the new showing, wouldn't there?

A. (Here witness nods.) I would like to state that I consider——

Chairman Geiger: Did you answer the question.

Mr. Mullin: He said yes.

The Witness: I would like to state that I consider that this estimate that I have made for this property is a minimum. There are other elements of value which I think might properly be considered, but some of them being controversial, I purposely omitted them.

Mr. Mullin: Cross-examine.

Commissioner Bricker: Do you feel then that the only elements that you have given are those which are not subject to controversy?

(No response.)

Commissioner Bricker: Maybe that is argumentative. Go ahead.

The Witness: I don't think I can answer that question, "Yes."

Cross-examination.

By Mr. Rush:

Q. Mr. Emery, did you personally observe the personnel of the Dayton Power & Light Company?

A. No, I did not. I made this study through a competent assistant who went to Dayton and went all through the details.

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[fol. 650] Q. Do you know whether or not your assistant talked to the various executives and with the various workers in this organization?

A. He talked to many of them.

Q. How long did he observe their method of conducting business?

A. Oh, I think he was in touch with them more or less for several weeks, he was not there all of that time.

Q. What was his opinion as to the efficiency of this personnel?

A. It was his opinion that it was a very satisfactory personnel for this type of business.

Q. And you are merely reflecting the opinion of your assistant as to the efficiency of the personnel?

A. Yes, and I am also drawing on my knowledge of the methods of operation of the Columbus Gas & Electric Company and I do not think that they would be satisfied with anything less than an efficient personnel, and I——

Q. Then in your estimation the $150,000.00 allowed for recruiting this personnel is as high as possibly could be, or should be allowed?

A. I think it is a moderate allowance.

Q. You say a moderate allowance?

A. Yes.

Q. Then this personnel could be more efficient?

Mr. Matthews: I am one of them.

Commissioner Bricker: Introduce him as Exhibit A.

Chairman Geiger: Well, we want you to take care of him. You heard what the judge said.

Mr. Rush: No, it is no reflection.

Mr. Mullin: Let me ask him—did you have a list of the executives, the length of time they had served and so forth.

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[fol. 651] Mr. Rush: Well, I would like to have him answer my question first.

Mr. Mullin: Well, I thought he had asked a question; I asked him for that.

Mr. Rush: I think I merely interrupted the answer.

Mr. Mullin: Answer that question then. Did you get the question?

The Witness: I think so. I doubt if I can answer that question yes or no.

Q. You have really answered it, have you not, by saying that you place a moderate figure; you have answered it half way between yes and no.

A. Well, do you desire any more of an answer?

Q. Well, if you can't really answer the question, then how can you place a value upon the cost of attaching, if you don't know just how efficient this personnel is?

A. Well, I think that that is a moderate allowance for the value of this personnel that the company has.

Q. And if the company's personnel is not as efficient as it should be, that lack of efficiency is costing the consumers as reflected in the request for the higher rate——

Mr. Mullin: Will you read that question?

(Previous question read.)

The Witness: Yes.

Mr. Rush: That is all.

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[fol. 652] Cross-examination.

By Mr. Enyeart:

Q. Mr. Emery, can you tell me how long this company has operated these gas properties?

A. The Dayton Light & Power Company?

Q. Yes.

A. Only a few years.

Q. Didn't you state that you had taken these figures over the several past years, the last few years in your statement on direct examination, the data has been accumulated from the several years—wasn't that your statement?

A. I gave some figures for past years as to new business expenses for three years past.

Q. Would the same basis be used if the company had only operated gas properties for a year and ten months?

A. The same method would be used with a proper matching of the cost with the new business secured.

Q. You don't know how long they have operated these gas properties do you? Answer yes or no on that?

A. (No response.)

(Here witness examines records.)

Q. Just answer it either way—one way or the other?

A. Well, as I stated before, all I know is that this company has operated these companies for only a few years.

Q. Do you know whether or not the company has operated only for a year and ten months—yes or no?

A. (No response.)

Q. Answer the question yes or no. That is all I ask.

Chairman Geiger: Well, if he knows—don't you know which?

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[fol. 653] Mr. Howland: Since July 1st, 1928.

Chairman Geiger: Since July 1st, 1928? All right.

Mr. Enyeart: That is all.

Mr. Holland: Pardon me, may I qualify that situation as to Washington—since January the 1st, 1925.

Mr. Enyeart: That is all.

Commissioner Bricker: Have you the figures, Mr. Emery, at which these properties were taken over?

The Witness: No, I have not.

Chairman Geiger: Mr. Emery, may I ask just one or two questions about your various items which constitute for going concern value? Taking up Number 1 which was recruiting business or recruiting personnel, is it?

Mr. Farrer: Employees or personnel.

The Witness: Yes.

Chairman Geiger: Now, I didn't quite get how you arrived at the fact that it would take $100,000.00 for those 24 executives; what salary are those 24 paid?

The Witness: They average $6,000.00.

Chairman Geiger: $6,000.00 apiece?

The Witness: Of which 40 per cent is applicable to the gas division.

Chairman Geiger: Of which 40 per cent you say?

The Witness: Yes.

Chairman Geiger: But you have found in your total you went through—oh, yes, I get you now, I get you now, I get you, $6,000.00 for 24 men, is that right?

The Witness: 20 men.

Commissioner Geiger: How?

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[fol. 654] The Witness: Twenty men.

Chairman Geiger: 20 men? That is $120,000.00; and how much of it is to the gas company?

The Witness: 40 per cent.

Chairman Geiger: 40 per cent—$48,000.00—to the gas company, there would be paid $48,000.00 a year?

The Witness: Yes.

Chairman Geiger: And you think that it would cost that to attach those men to the service of the company, an average of two years' salary for each one of them?

The Witness: With respect to those men, I think my testimony was that their value to the company is approximately $100,000.00; that is twice the annual salary.

Chairman Geiger: Well, they do not belong to the company; they are not chattels of the company; they are not the property of the company; they are simply men who are sought out and employed to work for the company, for which they receive a salary; is that correct?

The Witness: Yes, but the——

Chairman Geiger: Do you count them as a chattel of the company? that you can capitalize their value to the company and get a rate on it?

The Witness: The fact that they are gathered together in that organization with their experience is worth that much to the company.

Chairman Geiger: I see.

The Witness: In other words——

Chairman Geiger: In other words, it is worth to you, the way you figure it, about two years' salary in addition to

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[fol. 655] their being there.

The Witness: Yes.

Chairman Geiger: That is, if the company kept the employee for only two years, and paid the employee two years' salary, they would get all their money back; they are worth two years' salary; if they paid them for two years and then let them go, then they would have gotten full value for all the money that they had paid them in salary before they started on? They would not have paid them anything for the two years. I don't follow you. All right.

The Witness: If I get your question right, if they only stayed two years, they might cost the company a great deal more than the two years' salary.

Chairman Geiger: If they only stayed two years, they cost the company—they are worth two years' salary when you took them on; we are fixing this as of a date certain. I understand you attach them to the business on June 30, 1929, they became an asset of the company worth

$100,000.00 or two years' salary, for the proportion that we attach to the gas company; is that correct?

The Witness: Yes.

Chairman Geiger: So that——

The Witness: Or I might add, not the moment they were taken on, but after they were proven and seasoned.

Chairman Geiger: But at the given date certain. Now, passing to Number 2, attaching business, you gave the figures for nineteen when——

The Witness: 1926, '27 and '28.

Chairman Geiger: 1926 and 1927, and 1928; and that 419

[fol. 656] totaled how much?

Are you a gas company, Judge, before 1926?

Mr. Matthews: What is that?

Chairman Geiger: Were you a gas company before 1926?

Mr. Matthews: Well, Mr. Howland says we took over Washington in 1925; that was the first one; then these other properties—when did we take over Dayton?

Chairman Geiger: Now, what have you got, what figure?

The Witness: $210,341.00.

Mr. Matthews: Took over Dayton in 1925, he says.

Chairman Geiger: $210,341. Now, that amount of money was spent for some purpose?

The Witness: Yes.

Chairman Geiger: By the company?

The Witness: Yes.

Chairman Geiger: And you figure that that produced a gas clientage to consume a certain number of million feet of gas; is that right?

The Witness: Yes, sir.

Chairman Geiger: And by reason of that, you say that the cost to attach the gas business is eight cents a thousand feet?

The Witness: That was the indicated cost for this company.

Chairman Geiger: Well, now, do you know what this $210,000.00 item was?

The Witness: Their charges to new business under the usual classification.

Chairman Geiger: Have you got a record of this advertising?

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[fol. 657] The Witness: Advertising is included in it.

Chairman Geiger: Well, is it advertising in Dayton or where are the other companies, you say that they only have one-seventh of their service in these eight towns that are now under consideration.

The Witness: One-fifth of their service.

Chairman Geiger: Well, one-fifth of their service; well, you gave them one-seventh of the total amount?

The Witness: Yes.

Chairman Geiger: Only one-fifth of it; then we will say, where are the other places—in Dayton?

The Witness: That is outside of Dayton.

Chairman Geiger: No, outside of these that are now under consideration; they serve Dayton, don't they?

The Witness: They serve Dayton.

Chairman Geiger: Miamisburg—you don't know where that is?

The Witness: I don't know where the other places are outside.

Chairman Geiger: You don't know where any of this money that you talk of here as being expended, that $210,000.00; was any of it expended in Piqua, Troy, South Charleston, North Hampton or some place else?

The Witness: I do not know how the expenditure was distributed.

Chairman Geiger: You found a lump sum there on the books that was expended for promoting the business and you took it for granted that it took eight cents a thousand

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[fol. 658] cubic feet of gas to attach the gas business, that is what you finally came to the conclusion about?

The Witness: Yes.

Chairman Geiger: All right. Now, $50,000.00 for adjusting the property; that means the trenches will cave in or need re-filling or something of that sort?

The Witness: Yes.

Chairman Geiger: As bricks have to be relaid and all of that. All right. Now, this unification of values is a pretty heavy item. Do you mean to say that these people should pay a rate that comes to the company by virtue of the fact that they have unified a lot of separate gas companies

into one gas company and thereby made it more stable; is that your idea?

The Witness: Well, I think it is enormously to the advantage of the public to be served by a large, competent company.

Chairman Geiger: Well, now, why is there any value to a company living in North Hampton, because it is served by a big company that has got a very wide service of that kind, why has it any more value?

The Witness: In general, all of the expenses of a large company like that can be worked out more efficiently than by a small company.

Chairman Geiger: Do you know, have you figured how much it is going to cost the people of this district by virtue of the fact that there is a going concern value of $125,000.00—one-seventh of the total of $879,000.00?

The Witness: (No response.)

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[fol. 659] Chairman Geiger: You don't know.

The Witness: I haven't made any such computation.

Chairman Geiger: Now, let me make you a little computation myself. You add $125,000.00 to the going concern value for this small group of small cities; you expect to have a return of eight per cent; that means you have a return by virtue of this going concern value of $10,000.00 a year. That would cost the people at a five per cent rate an income on $200,000.00, or, if you were to take and convert it into Miami County and Clark County real estate, it would mean that the farmers of that community would have to sell 3,000 acres of land at $75.00 an acre in order to produce a sum that would earn sufficient at 5 per cent to pay you an income of 8 per cent on $125,000.00, which is merely made up of this going concern value. Don't you think we ought to figure around a little bit the other way on it? Have you followed my figures?

The Witness: Yes—but I confess that I don't see the application.

Chairman Geiger: You don't?

The Witness: It seems to me that as far as the gas consumers are concerned, it is a question of how much investment there is there at their service.

Chairman Geiger: You talk about being of value to them: Its value to them is that in that they have to pay you

$10,000.00 a year more for it and 8 per cent on $125,000.00 which you add to it.

The Witness: Well, I don't know how service is to be furnished to anyone unless the capital necessary to establish it is supported.

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[fol. 660] Chairman Geiger: Well, you have said that most of this $250,000.00 was gotten by reason of the skill of these people in amalgamating a lot of separate places together; that it was worth $250,000.00 to do that. It didn't cost anybody anything to do it?

The Witness: I believe it cost——

Chairman Geiger: Then when you bought it—but you didn't buy it with the idea that it was——

The Witness: I fully believe it cost five times that much.

Chairman Geiger: Five times that much—well, the property itself, but you are taking the unearned?

The Witness: No, I mean just the element that was added by reason of the desirability of unifying properties. It always costs more to body-up land than to buy an individual piece.

Chairman Geiger: You, by that means, assuming that this $879,000.00 going concern value was added over all the territory of this gas company—and that they should get 8 per cent on that, so as not to have confiscation, you would increase their income $61,000.00 a year. Now, that is pretty good for just going concern value, isn't it?

The Witness: No, I think that is a very moderate allowance.

Chairman Geiger: A very moderate amount?

The Witness: For it.

Chairman Geiger: Go ahead.

The Witness: There are a great many allowances of more than ten per cent.

Chairman Geiger: That is five per cent on $1,200,000.00

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[fol. 661] on this group of counties that is to be divided and paying the income upon a concern value—all right.

The Witness: If the value is there, I think that is perfectly just.

Mr. Matthews: Judge, the rate we are asking won't yield a per cent or anything like that.

Chairman Geiger: What is that?

Mr. Matthews: The rate we are asking will not yield 8 per cent or any ways near it.

Chairman Geiger: Well, glad to know that, but this is added to your value and that is all.

Mr. Mullin: It is added, it is a part of value.

Commissioner Bricker: You have been talking about value and valuing a utility property the same as you do an industry. I am just wondering. We have a location here in Ohio where there are many potteries; the most of the material is shipped into that country from other states; even from foreign countries. The reason that they are located in that immediate field is that there has grown up and developed thereabouts a trained or skilled labor, particularly qualified to work in the pottery business. Is there any way that that intangible of trained labor can be capitalized or is there any way that that company in making a valuation of its business, its going business even, can measure that item?

The Witness: Well, I think there is a general measure that I have used here and also people who were figuring on the location in a spot of that kind, for the purchase of an industry there, would take into account the difference in the cost of production between them—the cost of produc-

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[fol. 662] tion there and somewhere else, and would give full account to that in making their choice of location.

Commissioner Bricker: Don't they rather take conditions as they are and that the labor is there, and that does not enter into the values at all, just as you should take conditions in and surrounding your utility plant; that that consumer is there, he is going to be attached; there are trained laborers, always, there are men of ability; you did not put brains in them; there is some place that we must stop in this intangible valuation.

By Mr. Mullin:

Q. If you will answer this question: Would persons interested in the pottery business, give more for a pottery in this location mentioned by Mr. Commissioner Bricker, where there are a great many skilled workers living, than they would in a place where there are no such skilled workers living?

A. Why, they certainly would.

Commissioner Bricker: Of course, you could carry that to the extreme and say that a pottery built out here in the west end of this county where there is no labor would be worth practically nothing. It is an endless cycle, if you want to carry it on back, step by step.

The Witness: I would like to add, Mr. Commissioner, for the estimates that I have made, I have endeavored to make such as would represent what anyone would actually have to spend in order to produce this situation as it is.

Commissioner Bricker: Well, now, is this money which you claim or this value which you claim for the unification, money that is actually spent?

The Witness: Oh, yes. As I say, I have not been able

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[fol. 663] to get to the records in this case, but I have in a great many cases been able to get to the records of purchase, prices of properties made for the purchase, for the purpose of consolidation, and there are always large amounts representing this item of value. In fact, I don't hesitate to say that it is impossible to consolidate a group of properties that are any good, without a large expenditure of this kind.

Commissioner Bricker: Oh, yes, but that has already all been allowed in many other ways; you are asking for a consolidation value here and yet you are asking also for valuation on reproduction cost new whereas all of your original expense and original items of cost, the perfecting of an organization, your pre-construction costs so-called, are all to the limit, almost.

The Witness: No, this item has not been allowed for in any other way except that I might say that if it were not for this item, I think cost of financing should be estimated very much higher.

By Mr. Mullin:

Q. Mr. Emery, you just now stated that you thought the allocation that you made as between these towns and the rest of the company was fair and proper?

A. I feel that it is conservative considering it in relation to the gas distributed, the number of customers, and the mileage of mains.

Q. In considering the value of the personnel, so far as it affected the officers, did you have a list of the officers, the length of time they had been with the company——

A. Yes.

Q. You have that there?

Chairman Geiger: Well, you are familiar with the fact

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[fol. 664] that under your Ohio rule, we are to give some considerable consideration to the value "as of a date certain of all physical property other than land, owned * * * by such * * * utility or railroad * * *" which is to be arrived at by deducting the sum of depreciation from the sum of the new reproduction cost. That is a part of the rule.

Would you be able to say to us with any degree of authority that to reproduce the plant, we are entitled to take into consideration what it is going to cost to reproduce the human element, to educate people, to make their minds favorable to your organization? Where would be the limit on that?

The Witness: Well, that has all been done by these companies and it seems to me that they have a property right there.

Chairman Geiger: Did you ever testify in a rate case before?

The Witness: Oh, yes.

Chairman Geiger: Have you gone through the courts anywhere? What case is it, reported before the Commission, where the court has your testimony?

The Witness: In the case of the Rhode Island Company operating all of the electric railways, or nearly all of the electric railways in Rhode Island.

Chairman Geiger: Electric railways in Rhode Island; where did it go, to the Supreme Court of Rhode Island?

The Witness: Of Rhode Island, yes, sir.

Chairman Geiger: And they analyzed your figures?

The Witness: Yes.

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[fol. 665] Chairman Geiger: Did you have a going concern value there?

The Witness: Yes, sir.

Chairman Geiger: Training employees?

The Witness: It was not developed in as much detail as this.

Chairman Geiger: You don't know the volume and page? You don't know the volume and page of that report?

The Witness: No, I do not.

Chairman Geiger: All right, all right.

By Mr. Mullin:

Q. Did you have that list of officers?

A. Yes.

Q. Who is President of the Company?

A. Frank M. Tait.

Q. How long has he been President, according to the information you have?

A. 24 years.

Q. Who are the Vice Presidents and who is Vice President and General Manager?

A. O. H. Hutchinson.

Q. How long has he been connected with the company?

A. 37 years.

Q. Who is the Vice President first mentioned?

A. E. P. Matthews.

Q. How long has he been connected with the company?

A. 23 years.

Q. Who are the other vice presidents?

A. J. C. Matthews, 20 years.

Q. Who is the Treasurer?

A. O. E. Howland, twenty years.

Q. Who is Secretary?

A. Mr. Howland is also the secretary; there is an assistant secretary and treasurer, Mr. Greist.

Q. How long has he been connected?

A. 23 years.

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[fol. 666] Q. Assistant treasurer; assistant treasurer mentioned there?

A. Mr. Griest is assistant secretary and treasurer.

Q. What position does Mr. Light occupy with the company—George Light?

A. Manager of the Gas Division and he has been with the company 54 years.

Q. Do you have a list of the general employees?

A. The entire list averaged 23.5 years of service.

Commissioner Bricker: Have you taken into account any depreciation in the amount, in Mr. Light's service?

A Voice: He is on the shelf.

Chairman Geiger: How long has he been in the service?

Commissioner Bricker: 54 years.

Mr. Mullin: I think Mr. Light ought to be amortized.

Chairman Geiger: Well, you would concede this to be a fact, that if it cost something to attach gas, the individual consumer to your lines, in order to produce revenue, that that consumer has added himself as that contribution to that in the transaction; your line worth nothing at all except junk if you did not have a consumer, would it?

The Witness: That is correct.

Chairman Geiger: Now, don't you think you should give some credit to the consumer for the portion that he brings to the increase in value of your lines, instead of charging him for the increased value he gives to it?

The Witness: Well, I don't see very well how the company could pay him anything for it unless that went into operating expense.

Chairman Geiger: Well, we are not asking you to pay him for it, but we have a sort of a notion that you ought

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[fol. 667] not to charge him for it. He comes and pays his money and gets his gas and then you take that fact that he does pay his money and take the gas at the rate, is the reason why your company was worth more than it was before he came, and therefore you should get a rate and charge him more because he is a subscriber to your company. Then the next time, having paid more, you ask him to pay more again, because as he had made additional payment to the company it makes increasing value of your property. There would be absolutely no end to this.

The Witness: I don't think I can follow you through in that.

Chairman Geiger: All right.

The Witness: The simple fact is that the company puts gas mains in the street and service and meters to serve the people and among the expenses of providing that service is the one of getting the business attached, getting the wheels moving.

Mr. Mullin: I might say this morning that we stated that Mr. Emery was anxious to get some data as to the cost of financing actually paid by the Dayton Power & Light

Company, but our information was that it will not be available for a few days—three or four days.

Commissioner Bricker: All right.

Mr. Mullin: That is all.

We desire to file a summary of Mr. Emery's testimony.

Mr. Browning: I wonder if Mr. Emery can tell us the year of that Rhode Island case that we might look for it in the reports.

Mr. Mullin: Yes.

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[fol. 668] The Witness: It was about 1920—along about 1921 or two.

Mr. Browning: Well, we can locate it in the reports.

Mr. Mullin: You can do that.

Mr. Enyeart: I want to object to the summary as introduced.

Chairman Geiger: Just one moment. Are you aware of the fact that Section 614-23 especially excludes from the value of property for rate-making purposes, the value added thereto by reason of a monopoly or merger?

Mr. Mullin: Yes.

Chairman Geiger: You don't know?

The Witness: I don't know.

Chairman Geiger: Well, would you regard this added value that amounts in the group to $250,000.00, which you call unification of value—would you regard that as a merger?

The Witness: I would consider in that particular only a moderate sum equivalent to the cost of producing such a condition.

Chairman Geiger: Well, but is the condition produced, a merger?

The Witness: Yes.

Mr. Matthews: It may be a little technical, Judge—we did not merge, but we bought these properties.

Chairman Geiger: Well, I say, by reason of the merger of these properties, it is enhanced $250,000.00; the statute says you cannot take that into consideration.

The Witness: This is not what is commonly called monopoly value.

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[fol. 669] Chairman Geiger: Well, it is merged value?

The Witness: The merged value represented by cost of making it.

[fol. 670] (5) Working Capital

[fol. 671] F. H. Lerch, Jr., testified:

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[fol. 672] Q. Take up your next subject, working capital, I believe it is, if you are through with these general overheads?

A. Working capital is based upon an allowance for the materials and supplies which the company had in its warehouse and at different stock locations as of June 30, 1929, plus an allowance for cash which is necessary to have in the bank, together with one-sixth of the annual operating expenses, exclusive of gas purchases and one-twelfth of the amount expended for gas purchased. These figures are all

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[fol. 673] based upon the cost as of June 30, 1929. I might say in this that the cost of filling the system and the stock of gas in meters is not included. By the stock of gas in meters, I meant the amount of gas that has gone through the meter and not been billed for between readings.

Q. That is in the line?

A. It is in the line, yes, sir, and been used by the consumer.

Chairman Geiger: Well, what proportion of the actual operation do you put into this? That is, this first year of construction—half of it or all of it?

The Witness: I don't quite understand.

Chairman Geiger: You don't need capital all the year because you haven't your plant to work.

The Witness: No, we are considering this is the working capital that the company has to have when its plant is completed, and it is ready to start operations.

Chairman Geiger: Oh, yes.

The Witness: It has no working capital during construction.

Chairman Geiger: Not during construction. I see.

Q. What can you say as to the amount of materials and supplies and cash working capital you have allowed? That

is the necessity of it, for a corporation such as this, for the business expenses in question here.

A. I think the amount is very reasonable, considering the location of the plants in a highly-populated territory. The amount is reasonable. It would be low in a more isolated section of the country.

Q. How do the amounts which you have allowed here compare with the amounts which are allowed in the engineering

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[fol. 674] business and profession generally according to its general usages and customs in making valuations of this character in the actual property?

A. This is the customary procedure observed.

Q. Are the allowances you have made such as are customarily allowed?

A. As far as I know, they are, yes, sir.

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[fol. 675] Q. You have an item of working capital $83,200.00; would you explain how that was divided the material and supplies on hand June 30, 1929 and bank accounts and other?

A. I think I did, yes, sir.

Q. I am sorry to have you repeat it, but I did not make any notation of it?

A. I will be glad to do it. The item of working capital was made up of material and supplies, $5,218.00; operating expenses at one-sixth of the year's expenses, $21,933.00; gas purchased expense at one-twelfth of a year's expense, $46,142.00, and cash $10,000.00; that totals $83,293.00; you used $83,200.00.

Q. Was the item of material and supplies just taken as an arbitrary item you found on the books?

A. Yes, sir.

Q. As of that date?

A. Yes, sir.

Q. Do you know whether it averaged normally with what it would at other periods of the year?

A. No, it was so comparatively small that we took it as it stood.

Q. Hardly worth considering any other way I presume? The $46,000.00 for gas purchased is the big item here, do you know——

Chairman Geiger: Where is that?

Mr. Tatem: It is in the testimony; it goes to make up the item of $83,200.00 for working capital on Page 14. That is
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[fol. 676] down at the bottom of the page.

The Witness: The third item from the bottom on Page 14.

Mr. Tatem: And in that item, Mr. Lerch has testified that there is included an item of gas purchased $46,142.00; do you know under what terms the company pays for its gas?

A. Well, that is total expenditures for gas divided by twelve; that is one-twelfth of the annual expenditures for gas purchased.

By Mr. Tatem:

Q. Well, do you happen to know whether that is really required as working capital or whether this gas may not be paid for after the money is received by this company from its consumers so that such item of working capital would not be required?

A. Well, it is theoretically possible to have such a condition that you mention, occur, so that the dates of payment for gas by consumers coincide with the dates the gas for which you pay would expire—in such a manner that the money comes in before it goes out, but that is not always borne out in practice.

Q. Why do you select over the most unfavorable theory for the public?

A. No, I selected the practical theory, the theory that gives the amount of working capital that the company should have to conduct its business and not being unfavorable or favorable one way or the other. I am simply trying to give the facts as they practically exist.

Q. Well, having had experience in the matter of management of natural gas companies, can you say what the practice is as to giving terms to jobbers to buy the gas and distribute it through retail?

A. Well, the practice is that you theoretically do not give
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[fol. 677] terms but actually you get your money just as fast as you can, and it is not always according to the contract, that has been my experience.

Q. Do you think it is likely that a company such as the Dayton Power & Light Company, owned by the Columbia Gas & Electric Company, dealing with the Ohio Fuel &

Gas Company, owned by the Columbia Gas & Electric Company, might not be able to arrange terms by which they could let the consumers carry this loading of working capital in the sum of $46,000.00?

A. No, I don't think that would be fair to the Ohio Fuel — Gas Company.

Q. What would be the difference if they were both owned by the same company; why not let the public carry the load?

A. Well, the public is carrying it inasmuch as it delays its payments to the Dayton Power & Light for the gas taken.

Q. For thirty days with ten more off, no penalty?

A. Whatever the length of time is, the facts in the case are that whatever the theory of the matter may be, the company's income does not come in in accordance with its output of capital and it needs working capital.

Q. Did you check that in connection with this company?

A. I have not checked it in particular, no, sir.

Q. Do you know whether it pays for the gas before it gets payment for it?

A. I haven't checked it, whether they actually leave the check according to their contract or not; I think they live up to their agreement and do pay for it.

Q. Did any of your men check that?

A. Not to my knowledge; they might have, but I don't recall asking them to do it.

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[fol. 678] Q. And your inclusion of this other item of $40,000.00 as working capital is on the favorable assumption to your client that they pay for it before they get paid for it.

A. Well, it is not—I am not trying to favor my client, if that is what I understand you to say.

Q. Well, the favorable presumption there?

A. That is the presumption that is born out by facts all over; we know the company deals with a great many consumers, not all of which are the best pay.

Q. What is this item of $21,000.00?

A. That is operating expense; that is payrolls, et cetera.

Commissioner Bricker: Does this company require a deposit from its consumers?

The Witness: I don't know; I am not informed.

Q. Do you know what percentage of delinquencies there are on the average?

A. No, I would have to check into that.

Q. Do you know what losses they entail for insufficiency of deposits?

A. No, I was just trying to think whether I had seen any such figures, but I don't recall that I have.

Q. How did you estimate the $21,000.00 required?

A. That is one sixth of the annual operating expenses, exclusive of gas.

Q. Is that an amount that is fixed by some standard formula?

A. That is the amount that we have worked out and gives the most reasonable answer and protection to the interests of everyone in the allowance of working capital.

Q. And then why put the $10,000.00 on top of that?

A. Well, I don't know——

Chairman Geiger: Which $10,000.00?

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[fol. 679] The Witness: That is cash in the banks. I don't know of any banks that will carry your account unless you leave some money with them. Mine does not. And every one of these banks throughout every one of these towns must be used; they have to protect their funds, their income, and they have to carry and transfer them through checking accounts.

Q. Do you mean a bank would not care to carry this account unless it had $10,000.00?

A. Oh, no, this is the sum in banks of every one of these towns; it is the normal deposit left with the banks and it is to my mind very small.

Q. There are approximately how many locations?

A. There are eight locations.

Q. That would be over a thousand dollars each location?

A. Practically that.

Chairman Geiger: Well, what do you do now, do you deposit?

The Witness: They deposit their daily receipts.

Chairman Geiger: They do not have any checking account; the bank has to send it out right away to Chicago or New York, doesn't it?

Mr. Matthews: No, it don't go to New York.

Chairman Geiger: Don't go to New York?

The Witness: If this company does as the ordinary gas company does that I have observed—I have not checked this feature here—the home office draws checks on these individual depository banks either each day or each week or once a month, whatever the case may be, and they transfer the money in that way.

[fol. 680] F. C. Hamilton testified:

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[fol. 681] Q. Take the subject of working capital, what is your experience as to the amount of that necessary for the plants such as are involved in this proceeding?

A. Most of your properties have an amount of working capital equal to about a month and a half of operating expenses, including cost of their gas.

Q. In your judgment, is that amount necessary?

A. Oh, certainly, you have got to maintain the credit of your company and you have got to have some cash to do business with and you have to have something in the bank if you are going to maintain your standing in the locality

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[fol. 682] where you are doing business.

[fol. 683] General Overheads

[fol. 684] F. H. Lerch, Jr., testified:

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[fol. 685] Q. Proceed from there with your direct overheads or whatever you have—the general overheads?

A. The next item that we have considered is the general overhead charges. These charges cover the engineering, superintendence during construction, the administrative expenses, interest, organization costs, law expenditures, insurance, taxes, and the cost of financing the enterprise.

Q. Do these items contain any of the items you have described as direct overheads just a moment ago in your testimony, or any part of such allowance?

A. No, sir.

Q. Proceed.

A. The engineering and superintendence during construction of the distribution system is allowed at five per cent, and on general property at one per cent. This covers the engineering fee and charges of the general engineering organization which supervises the construction of the plant, sees that it conforms to the specifications and plans designed for it, is located properly and this is all of the general engineering supervision that is called for. The

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[fol. 686] charge is based upon typical expenses and fee cost for this type of work.

The administrative expenses during construction are 2 per cent on distribution system and 2 per cent on general property. That allowance is designed to cover the cost of the company organization, maintaining its records of expenditures, making its expenditures and looking after the general operation of the construction for the financial institution or stockholders of the proposition. Interest during construction is computed at seven per cent for distribution and general property. It is based upon the estimated rate at which money could be obtained for the purposes of this construction, and assumes its use for one year. Organization cost is based upon the percentage of two and a half per cent of the distribution system and general property. This organization cost includes the time and expenses of the promoter's or organizers of the idea of serving gas in those several towns, the time that they spend and the expenses incurred in interesting others in the proposition; in the compiling of data as to the market, the supply of gas and the financial requirements, and in interesting bankers to finance the construction.

There is nothing included in this allowance for a promoter's fee or profit. This is designed to cover only the time and expenses of such pre-construction or organization costs. It also includes preliminary legal expenses, preparation of charter and such associated matters. The law expenditures, insurance and taxes during construction are consolidated as one percentage, of one and a half per cent

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[fol. 687] on both the distribution system and general property. These law expenditures are those incurred during construction, in clearing up any disputes, rights of way, damages, securing permits and such other actions as re-

quire legal service. Insurance during construction covers the insurance taken out on completed structures or property prior to their going into use and becoming operating equipment. Taxes during construction are based upon the laws of the State of Ohio which requires either the local listing of property or the reporting of public service property to the tax commission of the State. It is based upon the amount of taxes which would be paid during the construction period.

Commissioner Bricker: Did you check whether or not such tax is actually paid in the State of Ohio?

The Witness: that is my understanding. Yes, sir, I have discussed that.

Commissioner Bricker: What inquiry did you make on that?

The Witness: I discussed that with the attorneys for the company and also with the tax authorities of the companies—the men who look after the taxes of the company.

Commissioner Bricker: Did you take the matter up with the tax commission at all to find out how it does actually happen in Ohio?

The Witness: No, I took it up only with the tax man for the company.

Q. Will you please specify the Ohio attorneys with whom you discussed it?

A. I discussed it generally with Mr. Matthews and Mr. Langdon and particularly with the taxing man of the

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[fol. 688] company.

A Voice: Warnock.

The Witness: Mr. Warnock.

Q. Does he make a specialty of that subject?

A. I understand that Mr. Warnock makes a specialty of it and was either a member or an employee of the Tax Commission.

Q. Will you please state for the record so that the Commission will have it for the purpose of checking up what the results were as you understand them of that computation?

A. Well, assuming that the construction of this propert will take a year and would start on the first of July, 1929, as the date of the report, we found that the tax rate was in

the neighborhood of $2.00 per hundred or roughly that is the average through the territory. If at the end of the year of 1929, this investment had been made to the extent of say $750,000.00 of the total expenditure—that is just an assumed figure as an illustration; but it is pretty close to what would be done at that time assuming the year's construction period—we find that it would be necessary for the company to list it legally, assuming, of course, that there were no consumers attached, and that the investment had not yet taken the status of a public utility. If on the other hand, it had to take the statis of a public utility, it would have to be listed with the tax commission as of December 31, sometime prior to April 1st, of 1930. If it were simply listed locally, the local date of listing, so they informed me was April the 13th of this year. On December of 1930, the company would be called upon to pay the taxes for the first six months—or the first six months' taxes—

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[fol. 689] upon the property listed either at January 1st or at April the 13th as the case might be.

Q. Pardon me, you didn't yet specify the value at which you would list it.

A. Well, I am coming to that.

Q. Pardon me.

A. The assessment would be after certain allowance for non-assessible property approximately 60 per cent of the $750,000.00, or about $450,000.00 on which the company would pay $9,000.00 taxes, half of it due in December, 1930, and half in June, 1931.

Chairman Geiger: Or about say half of the $750,000.00?

The Witness: I took 60 per cent as that is the approximate ratio of the assessed value that the company returns to what would correspond to reproduction value.

Q. The commonly used proportion of actual value?

A. Yes, sir.

Q. By tax authorities?

A. Yes.

Commissioner Bricker: Of course, the taxing value is not the reproduction value?

The Witness: No, sir; I am simply using these figures as the illustration of how much taxes we would have to pay.

Commissioner Bricker: Is this all computed on a year's construction of plant?

The Witness: On a year's construction, yes, sir. The property would then have to be listed again at December 31 or January the 1st, 1931, but during the first half of the year, 1930, it would still be in construction—at least partly in construction because for the year of construction period, that wouldn't be completed until the end of June, so we then have assumed the half of the taxes for that year which would be on a larger amount than $750,000.00, would be

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[fol. 690] added to the first $9,000.00 the company was assessed, making a total tax of something better than $20,000.00, of which half of it might be chargeable to operation, assuming the plant came into gradual operation, and half to construction.

Commissioner Bricker: No portion of the tax, though, would be paid until the whole system had actually come into operation as a public utility?

The Witness: That would be an accident of the date, yes, sir. That is true, however.

Commissioner Bricker: And there would be no duplication of taxes in the first year on payment, there would be no tax to pay to the state except beginning with the first year of operation and then your annual tax?

The Witness: That is right, the tax allowance that we have made simply covers the time from the beginning of the investment right straight along according to the taxing dates.

Commissioner Bricker: Well, now, on the interest during construction, what amount of the reproduction value did you take at 7 per cent on?

The Witness: Everything except the general overheads and working capital.

Commissioner Bricker: So that upon the theory that at the very beginning of the construction the financing was all done and the money available.

The Witness: Yes, sir. I think that is the correct assumption in a proposition of this particular size. It is a proposition that has to be done all at once. I am just thinking now of it from a promotion point of view. It is not like

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[fol. 691] a tremendous system of pipe lines going out

through the country where you can attach business as you get your system extended.

Commissioner Bricker: As you go along. I was just wondering if that theory ought to apply where it is largely done upon borrowed money. Wouldn't you rather borrow money as you go along and only pay the interest from the time that it is actually borrowed and used?

The Witness: Well, of course, that assumes—that theory would assume that we had some one's credit back of this proposition. We are assuming now in a reproduction theory that it is a proposition which stands on its own feet and that the promoters are putting it over as a proposition of theirs. There is no place for them to borrow the money. If they do borrow it, they would have to fund it later or sell stock or something of that kind and it is a grave question whether they could sell stock, certainly not common stock, on the assumption that we have made. They might sell some preferred stock, but the cost also would be high anyway.

Chairman Geiger: Well, the real construction has always been of borrowing money, has it not, nobody is going to have enough money to conduct the whole construction from the start.

The Witness: No, that is not quite true, Mr. Commissioner. There is in a large enterprise a certain set of state development, but the money for any of those particular stages is all contracted for and goes on interest at the time of the contract, and in fact—in a large enterprise, unless the money is committed for the company, or the contractor, why, the contractor is in a pretty bad way, because

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[fol. 692] he can easily be pinched at the most strategic moment when he needs the money the most.

Chairman Geiger: Do you mean to say if you are going to make a million dollar contract and had a million to do it that you would borrow your million dollars to start out and pay interest on it?

The Witness: I think so, yes, sir.

Chairman Geiger: But you would not be using it all?

The Witness: No, sir.

Chairman Geiger: And you would not deposit it or buy government securities or something above that amount?

The Witness: Well, you would deposit a million on the start of it. For instance, you would contract for your pipe, almost immediately, you would make that contract for your pipe, before you financed your operation, and that pipe would be shipped promptly, especially in a construction of this kind, with small sizes and with a great deal of it in the market, and that pipe would have to be paid for promptly so that the net investment in the first six months would come constitute a large part of the million dollars. It is not expended entirely uniformly throughout the construction period. You would have all your meters for instance——

Chairman Geiger: You would have your pipe delivered at the beginning of the one year's period?

The Witness: Yes.

Chairman Geiger: On the ground, so that you had to pay for it; you could put it in the ground in a good deal less than a year, couldn't you?

The Witness: We have assumed that the end of the con-

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[fol. 693] struction period would be at the end of the first year. Some of it, will, of course, be under.

Chairman Geiger: Well, what do you base that assumption on?

The Witness: Well, on our general experience in the time it takes to get one of these plants into operation, and getting the business hooked up.

Chairman Geiger: Well, a part of that period is the part in which you have the preliminary work, in which you haven't the pipe on the ground.

The Witness: No, that is only the first part of the construction period. We are assuming that this interest begins when the construction begins. We order the pipe. We should have pipe inside of two weeks from the time we ordered it.

Chairman Geiger: Well, your opinion is that starting from the time you have pipe on the ground and continuing in the ordinary method of construction with the ordinary facilities it would take you a year to do that?

The Witness: Yes, we figure about a year to complete the installation of all of these.

Chairman Geiger: That would mean that you would work first in Piqua and complete that, and then in Washington Court House and complete that——

The Witness: No, a number of towns would be carried on and the work done simultaneously. Of course, it would be interfered—you can not do so very much work in the winter in pipe line construction in this country so that that is not like having 365 days to work.

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[fol. 694] Q. Just a moment, on these items of general overheads that you have specified, could such a plant be constructed without incurring these charges?

A. No, sir.

Chairman Geiger: How do you know?

The Witness: Because we have paid money for that, for building these plants.

Chairman Geiger: I know you have paid money for building a small plant, but have you ever been in an operation where you built as many as the number of plants you have here all at one time.

The Witness: No, but I have been in operations where we have spent many millions of dollars more than this—many millions more. For instance, our own—the plant

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[fol. 695] that I am the manager of myself costs about sixteen million dollars as it stands at the present time.

Chairman Geiger: Costs what?

The Witness: About sixteen million dollars for plant investment as it stands at the present time. We incurred all of these expenses in building that plant.

Chairman Geiger: All right.

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[fol. 696] Q. Are each of those items actual construction costs of the physical property?

A. Yes, sir, I think they are.

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[fol. 697] Q. Could such a plant be constructed without incurring such charges to at least the amounts you have specified?

A. I think not.

Q. And then they are reasonable, you say?

A. I think they are reasonable, yes, sir.

Q. What is the fact as to such allowances being always made according to the general usages and customs of the

engineering business or profession in making estimates of construction costs of such properties?

A. I have never seen a proposition set up for financing without including these or a proposition being considered that does not include these expenses.

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[fol. 698] Q. Then your answer is in substance that they are always allowed according to general usages and customs?

A. Yes, sir.

Chairman Geiger: Well, now, do you mean that the engineers who are accustomed to testifying before Commissions have designed and fixed a plan by which they give the estimate of the cost or do you mean that some contracting company or some company which wishes the work to be done for it have adopted this plan?

The Witness: No——

Chairman Geiger: In other words, this is a plan for the witness or for the *a* plan of construction?

The Witness: This is not a plan in the sense of a plan—this is just a statement of what actually occurs in this kind of work out in the business.

Chairman Geiger: How much is this kind of work ever done by you?

The Witness: Yes, sir, we do this kind of work all the time.

Chairman Geiger: All right, all right. Go into a city as large as Lima or Washington Court House and lay new pipe in there?

The Witness: Yes, sir, we have done that and we have gone into much larger towns. We have had more to do with the financing and the engineering and the construction of the Southern Natural Gas Corporation, for instance, which is at the present time about a 20 or 25 million dollar investment and is to be a thirty-five or forty million before it is a complete job, and all of these matters, exactly as I have set them up here have been taken into account in con-

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[fol. 699] sidering every item of that investment before it would be recommended.

Q. Mr. Lerch, I don't think you answered directly one question that was asked you, and I think it may properly be done. You were asked if this up is one that is prepared

for rate cases substantially or if it is what actually occurs in the real construction of a plant such as this?

A. That is what I thought I answered when I said this was not a plan for rate purposes. This is simply a set-up of the actual facts as nearly as we can portray them in the report.

Q. Would all of these costs be incurred in the construction of the physical plant only, whether the plant ever was operated or not?

A. Yes, sir.

Q. Are any of them duplicated in the direct allowances which you made or allowances you made for direct overheads?

A. No, sir, they are not.

Q. Do they contain any element of going concern value or any item that is considered in determining going concern value?

A. They do not. They are based entirely upon actual out-of-pocket expenditures regardless of whether the plant ever becomes a going concern.

[fol. 700] F. C. HAMILTON tetsified:

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[fol. 701] Q. Mr. Hamilton, are you acquainted with the practice and necessity of making overhead allowances in the valuation of properties?

A. Yes, sir.

Q. What kind of overheads are there, generally speaking, in such valuations?

A. There is the engineering and superintendence during construction; there is interest during construction, your administration expenses during construction, your legal expenses, insurance, taxes and certain costs of your financing.

Q. Sometimes they are classified as "Direct" overheads and "General", are they not?

A. Yes, sir.

Q. As to the direct overheads, charges on materials, is there such an item as purchasing account?

A. Yes.

Q. What is that for; explain it please?

A. All of the requests that are built up from the engineering studies are turned over to your purchasing department with an idea of getting bids, recording those bids, following up the material after the order is placed to see that delivery shall come at a time when you need it on your construction, and that work—your accounting has to be set up, your accounts classified, and you have to have time-keepers and accountants on the job for the purpose of keeping the records of the expenditure of the money, and of auditing after the construction; those expenditures,

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[fol. 702] and reporting either to the company for whom the building is being done, as in the case of a parent company like ours, or to the stockholders in the case of an individual project.

Q. You are speaking now of the direct overheads that enter into the building, or of the general working?

A. Some of the accounting is direct, such as the time-keeping out on the job; they are direct, and the other accounting, that takes care of the money and reports to the stockholders is ordinarily placed over in the general overhead.

Q. Did you hear Mr. Lerch testify on that subject in this case?

A. No, sir, I did not.

Q. In the direct overhead charges on materials, what is meant by warehouse, handling, checking?

A. Just the receipt and checking of the material to be able to voucher your bills accurately and determine whether you do get the material for which you are billed; the taking that material out and discharging it to the various drivers, teamsters, truckmen for delivery, and the accounting for that material.

Q. What is the fact as to those charges being actual costs that enter into the prices of the materials?

A. Well, they are just as actual as the labor that went into that desk, and after it is finished, it is just as intangible. We know there is a desk there, but the wood is all we can see. Now, the labor has disappeared from sight, but it is just as intangible as these items are.

Q. What can you say as to the loss and waste of material as a direct——

A. You can not handle a large amount of material without losing some of it or wasting some of it, whether it hap-

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[fol. 703] pens to be cement or pipe.

Q. Is that in your judgment an actual necessary part of the cost?

A. Oh, yes, of course.

Q. The material checked in the field; I think you substantially mentioned that, did you not?

A. Yes, sir.

Q. What is the fact as to incomplete inventory and contingencies?

A. From the standpoint of incomplete inventory, I have made inventories on properties a good many times with the engineers of this Commission, and never have compared those inventories at any time that I did not find the engineers of the Commission had included some things that my men had missed nor did I ever find an inventory where I did not find I had found some things which they had missed, both groups of men being honest; there was nothing included in either inventory that did not exist. If two other engineers had followed us around, they would probably have picked up some smaller amounts; and always there are omissions in inventories; you can not possibly see all of the things and get them all, and the further omission is always there for this reason; everybody is prone on a nice day to assume that all the construction work was done on a nice day; all of the unit costs are built up on a single day's labor. I put my men out as to reconstruction gangs, they are laying mains and service; put them out with a timekeeper and have a unit of labor established for a gang of a particular size, and I use that. If I didn't add something for omissions and contingencies, I never would get in that part of the cost. That is due to the pipe being a little late, the teamster being delayed in delivery of it, freight being held up, your dear plumber

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[fol. 704] friend forgetting some of his tools and going back for them when you wanted him to do something; your electric welding running out of supplies; rod or something of that kind, and all of the little things which as a matter of course over the whole period of the job continue to happen. Nobody yet has been found that I know of

that is smart enough to have everything at the right place at the right moment, and then in addition to be able to keep the men home the day it is going to rain and not let them even start. Now, they do waste time.

Q. The direct overhead charges on part of what you have said covered that also?

A. Yes, sir.

Q. As to the general overheads, superintendence and engineering, as to a plant such as involved in this proceeding, what is the fact as to the existence of such costs?

A. Oh, of course, if you did not have some engineers on the job, you would not have a plant you could operate when you got through.

Q. The amount allowed in this case for the distribution system for engineering and superintendence during construction is five per cent, and on general property one per cent; what can you say as to the amount of those allowances, in your judgment?

A. Well, on a job of this size if you hired an outside engineer, he would probably charge you five per cent straight.

Q. Could you do it yourself for less than that, do you think?

A. No, I don't think we could.

Q. You mean on both overheads, distribution and general, five per cent straight?

A. Our engineering department last year—and we had about eighty-five million dollars' worth of construction

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[fol. 705] work—handling it with our own construction force, and our own engineers, and there was a five per cent charge on all of it—at the beginning of this year, there was a discussion of the Executive Committee as to the changing of that amount for the simple reason that it showed our engineering department last year showed had a loss—their actual expenditures were greater than the five per cent.

Q. What can you say as to the administration expenses during construction? The allowance made in this case is two per cent on both distribution system and general property; what in your judgment would the fair allowance be?

A. I think that is very low.

Q. In your judgment, would such a cost be incurred to at least that amount?

A. Yes, sir.

Q. Interest during construction; what is that?

A. No project can be built without either the credit of somebody or the actual cash in hand. If somebody of sufficient credit standing were to guarantee the payment of the bills, we would not have to raise the money first, but nobody would do that without some compensation for that very guarantee. If you raised the money first, I should think seven per cent would be a very low amount, and I doubt whether in a natural gas project of this size, you could raise the money for seven per cent.

Q. On the item of law expenditure during construction, insurance during construction and taxes during construction; what are those?

A. Those are items that come as a matter of course during the work. You have to employ lawyers; you have to report your property for taxation and while you do not

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[fol. 706] have to carry insurance during construction, it is a very foolish practice—in other words, it is just as foolish for a company not to carry insurance during construction as it would be for an individual to run around without insurance.

Q. That is, some charge of insurance?

A. Yes, sir.

Q. The amount allowed here is one one-half per cent for all of those items on both distribution system and general property; what in your judgment is that——

A. That is low.

Q. The cost of financing and before we go to that, Mr. Hamilton, what in your judgment is a fair amount of the direct overhead charges in general on labor and material such as we have mentioned. You have detailed it——

A. I don't believe I would give an answer on that, because I have not for several years paid any particular attention to that. I have not been out on the job—on the construction jobs.

Q. I see. Another thing: Are any of these general overheads that you have testified about in any manner included in or reflected in going concern value?

A. Not as I define and compute going concern value.

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[fol. 707] The Witness: That was just one end of the service.

Chairman Geiger: All right. Well now, one other point and then I will quit unless someone else suggests something. In his set-up here as I understand it, he charges seven per cent. for the whole year on the total cost of reproduction on the theory as I gather that it would be necessary at the beginning of the reconstruction to have available all your money that it is going to take for the entire year and for the entire reproduction, you are bound to pay seven per cent. on that; is that correct?

The Witness: If it is for a small amount and for a short construction period like this of one year; if you are going into a project that covered two or three years, then you would get your money in sections or if you were going into a project that involves many millions of dollars. But a loan of this size, for this amount and with such a short duration would be taken for the year, I think, without a doubt.

Chairman Geiger: And your seven per cent. would be a proper rate of interest?

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[fol. 708] The Witness: Seven per cent. would be a very good rate if we got it for that, yes, sir.

[fol. 709] Frank Parker testified:

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[fol. 710] Q. Doctor, in your investigation of these questions and in your experience, are you acquainted with the items of expense incurred in constructing various properties, such as utilities and manufacturing institutions and so forth?

A. Yes, I am generally familiar with that practice.

Q. Are you familiar with the overhead charges that are used in such matters, such valuations?

A. Yes, generally.

Q. What is the fact as to there being incurred in the consruction of a utility property, or any other institution of similar size, charges which are designated as overheads?

A. They are just as real and they are just as genuine and they are just as unescapable as this other item that we are talking about—cost of financing and cost of obtaining money.

Q. Sometimes they are classed as direct overheads, general overheads?

A. Regardless of the other classification there as direct or general overheads, they represent in the construction of your property the expenditure.

Q. That is true whether the institution be constructed as a utility or a non-utility, is it not?

A. It would not make a bit of difference; every commercial enterprise that existed is exactly similar, the industrial expenditure is the same thing to get over and the bankers know it.

Q. And in estimation of such property and estimation of valuation are such items always included?

A. Always, invariably.

Q. If they were not included, would you have a complete estimate?

A. You would not.

Q. What are the overheads which you understand to be general overheads, generally speaking, Doctor?

A. General overheads as I understand it, would include such items as superintendence during construction, en-

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[fols. 711 & 712] gineering during construction, administrative expense during construction, interest during construction, organization expense during construction, law expenditures, insurance, taxes, sometimes they put in, although I do not personally agree, with the cost of financing; I regard it as a separate item; it is there and it is just as tangible as the general overheads.

Q. What are direct overheads; I think I have heard you use the word "field" overheads?

A. Direct and field overheads, is the two terms and as I understand it, are about the same; they involve the overheads on this part—directly construction account; they involve different accounts, for example, purchasing and accounting, warehousing the materials, the loss and waste incident to the use of those materials; material checking in the field; incomplete inventory and contingencies, superintendence, job administration, et cetera.

Q. Are those because of physical properties, only, Doctor?

A. I beg pardon.

Q. Those are because of physical properties, are they not?

A. That is correct, yes, sir, they fall under that.

Q. Do they include any item of cost or not, commonly included in going concern value?

A. Absolutely not.

Q. Are you familiar with the allowances made for general and direct overheads in this proceeding?

A. Yes.

Q. What is your judgment as to the reasonableness of such allowances?

A. I think that from other experience in other utility cases that they are very fair.

[fol. 713] B. Operating Expense of Appellant

[fol. 714] (1) Gas Purchase Contracts

[fol. 715] DANIEL S. WEBBER testified:

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[fol. 716] Q. Your name is Daniel S. Webber?

A. Daniel S. Webber.

Q. Mr. Webber, where do you reside?

A. Columbus.

Q. How long have you lived in Columbus?

A. Since 1913.

Q. What is your business?

A. I am now in the brokerage business, buying and selling oil and gas properties.

Q. How long have you been engaged in the natural gas business, and in what capacity and where?

A. Since 1903. I started in Pennsylvania with the Standard interests in leasing and buying in natural gas territory, and rights-of-ways for pipe lines. Came here in 1913 with the Ohio Fuel Supply Company in the same work, and was with them until 1927.

Q. With the Ohio Fuel Supply all the time or part of the time——

A. The Ohio Fuel Supply and Ohio Fuel Gas Company.

Q. In what departments of the gas business were you engaged in Ohio during the period you have named?

A. In leasing and buying gas territories.

Q. What was your position with the Ohio Fuel Gas Company?

A. Superintendent of the lease department.

Q. Have you any connection with the Ohio Fuel Gas Company at the present time?

A. I have not.

Q. How long since you were in its employ?

A. Since June, 1927.

Q. Are your in any manner connected with the Dayton

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[fol. 717] Light & Power Company directly or indirectly?

A. I am not.

Q. Have you any connection with the Columbia Gas & Electric Corporation in any way?

A. I have not.

Q. Oh the Columbia Engineering and Management Corporation?

A. I have not.

Q. Are you acquainted with the prices that are paid generally for natural gas delivered to localities for domestic purposes; what are known as city gate rates?

A. I am.

Q. You are acquainted, are you, Mr. Webber, with the towns of Sidney, Piqua, Troy, North Hampton, Tippecanoe, South Charleston, Washington Court House?

A. Yes, sir.

Q. Of course, you know their comparative sizes and locations and so forth?

A. Yes, sir.

Q. Go what extent have you become familiar and are you familiar with the prices paid in the locality of those towns and throughout the state generally for natural gas delivered at the city line for supplying them with domestic consumption?

A. Why, I know what the prices are generally throughout the state.

Q. How long have you been familiar with such prices?

A. For 15 years.

Q. In your judgment what would be the general going price or the general market value of natural gas delivered at the places mentioned, particularly at the city gates, assuming that the total deliveries for the year amounted to approximately 1,000,000,000 cubic feet?

A. Why, a fair going price would be 45 cents and upward.

Q. In your judgment, is that the general market value of gas in that locality and throughout the state generally

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[fol. 718] in such quantities?

A. It is.

Q. What is the fact as to there being a difference between the supply of gas for industrial purposes, and the supply of the same annual amount for domestic purposes, if there is a difference?

A. Well, there is a considerable difference because there is a variation in demand.

Q. What do you mean by that?

A. Why, supplying the domestic consumer requires for peak load conditions at least five times as much as they will use in the warm summer weather.

Q. What do you mean by the peak load conditions?

A. Zero weather.

Q. And are there certain times of day in the winter when you have to have much more gas than you do in the average period during the day?

A. Yes, sir, there are.

Q. As a matter of fact, what are those periods?

A. Why, in the morning, and from 7:00 o'clock on until 11:00 in the forenoon.

Q. If the company supplying domestic consumers doesn't have an adequate supply to take care of the peak demands during the coldest winter days and coldest periods in those days, what is the result to the service?

A. They lose their customers.

Q. Bad service, and the people can't warm their houses and do their cooking?

A. Yes; put in other fuel.

Q. In your judgment, what would be the difference in the price of gas delivered for industrial purposes and the same amount of gas yearly delivered for domestic purposes; taking for illustration approximately the amount delivered to the towns mentioned as stated in the previous question?

A. Well, I should say at least 33 1/3 per cent.

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[fol. 719] Q. That is the industrial rate would be only about two-thirds of the domestic rate?

A. Yes, sir.

Q. Of the city gate rate for domestic purposes?
A. Yes, sir.
Q. Why do you say that?

Chairman Geiger: The industrial would be 33 per cent?
Mr. Mullin: No, the industrial would be two-thirds.
The Witness: One-third difference.

Q. Why?
A. Because you can depend on the constant amount for the industrial consumer at least 300 days of the year I should say, where they will take a certain number of thousand cubic feet regularly, while the domestic consumption varies from one—it would be five times greater or more in the winter peak load condition.
Q. What effect does that have upon the number of wells that a company must have to adequately supply the peak demand?
A. Why, they must have a greater number of wells, greater pipe line capacity, greater number of compressing stations, and greater amount of reserve acreage to protect their output.
Q. Are the facts as to the difference in the price for the industrial and domestic purposes which you have mentioned generally recognized in the business?
A. They are.

Mr. Mullin: Cross-examine.

Cross-examination.

By Mr. Keyt:

Q. What towns in Ohio have lower rates than a 45 cent 938
[fol. 720] rate?
A. What towns in Ohio?
Q. Yes.
A. That are buying gas at the gate?
Q. Gate?
A. Well, I don't know of any except Cleveland, Ohio, I think has about 41.8 cents. They are buying——
Q. Columbus, Ohio?

By Chairman Geiger:

Q. Cleveland has how much?

A. I think Cleveland pays 41.8. I am not positive of that figure, but I think that is about the price.

By Mr. Keyt:

Q. How much is Portsmouth, Ohio paying?

A. Well, they are buying their gas from West Virginia just across the river where gas is more plentiful and they pay, I think, about 19 cents, or 29; I am not sure of that, but it is below 40.

Q. What is your answer?

A. I am not sure of that price. It is less than 40, but they are buying West Virginia gas from the United Fuel Gas Company. The gas is more plentiful in West Virginia than it is in Ohio, and it is not necessary for them to transport it so far.

Q. What about the other towns down in that locality?

A. I don't know of any town down there that is paying less than 45 except Portsmouth.

Q. Do you know how far it is from Portsmouth to the towns in this locality under consideration here?

A. Well, I should say it is over 100 miles, isn't it?

Q. Would it cost the difference between 45 cents and 19 cents to transport the gas up here?

A. Well, I am not stating that as positive.

Q. Well, just how did you arrive at that figure of 45 cents then?

A. Because of the general price paid for gas, for indus-

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[fol. 721] trial gas, and from the general price paid for gas at the gates of the towns.

Q. Did you investigate all the towns in Ohio?

A. I investigated a great many of them; 30 odd.

Q. What about Toledo?

A. Well, I have investigated that but I don't remember just what that figure was, but I think it was around 45 cents. I am not sure of that figure, but I am satisfied that the price is above 45 cents, the average price of the towns that are buying gas at the gates.

By Commissioner Bricker:

Q. From what field does Toledo get its gas?

A. I think from the Columbia Gas & Electric.

Q. From the same source that these towns in question get their gas?

A. Yes, sir.

By Chairman Geiger:

Q. What does it pay?

A. I don't remember that figure.

By Commissioner Bricker:

Q. Do you know whether or not there is any competition in this field that is involved in this case for the supply of gas at the city gates?

A. I don't think there is any competition, for I don't know of anybody that would have sufficient gas to supply these towns in Ohio. I wouldn't know where to go to find the quantity——

By Commissioner Klinger:

Q. May I ask you to explain why there is a bigger price demanded or justified, rather, of a distributing company or city which buys it at the gate than if you sell it to a manufacturing industry?

A. Because the manufacturer can assure you that he will take a certain amount every day in the year. For instance, we make a contract with a manufacturer to supply them 2,000,000 cubic feet per day for 365 days; he will

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[fol. 722] contract to purchase that amount and you can be prepared with that amount of gas, while a city you must go out—for instance the city of Columbus perhaps to use an illustration, will use today 10,000,000 cubic feet where in a peak load day they will require 60,000,000 cubic feet. You must go out and drill the wells, take up acreage, build pipe line and compressor station preparatory to taking care of that 60,000,000 load, and it takes more money——

Q. Isn't it a practice that when you have these extreme low temperatures the community just carries the distress, and they get along without it; isn't that the practice?

A. Oh, no, it is not the practice, no, sir. It is the attempt of the companies that I have been associated with to have sufficient gas to supply that demand every day in the year. The first thing we did at the beginning of every

year was to anticipate what gas we would need for that peak load day, and we devoted every energy to finding that gas for that peak load day. There is no question about that.

Q. I have lived in a part of the state where they have had gas probably as long as any place in Ohio, and that has been my experience, that when you have extremely low temperature we just have to do with less gas.

A. Well, it hasn't been my experience in Columbus under the Columbia—now, the Columbia gas. We generally had gas for every day in the year except perhaps a few hours, some pipe line trouble or compressor station trouble; but it is my experience that every company strives to be prepared for that peak load day, and doesn't hold back in spending money to be prepared for it.

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[fol. 723] By Mr. Mullin:

Q. Mr. Webber, regarding the Cleveland supply; that is purchased at the Ohio River?

A. Purchased at the Ohio River and transported by the company from the Ohio River.

Q. Measured at the Ohio River?

A. Measured at the Ohio River.

By Commissioner Klinger:

Q. What justification is there of putting the price at 48 cents rather than 35?

A. Well, because you can find industrial markets for a great number of million cubic feet in Ohio for 45 cents, or from 35 cents on up. I have been told by certain industries that they would not lose the gas if they had to pay $1,00 a thousand for it.

Q. Well now, I have in mind a situation of gate charge by this same distributing company; they charge Lima and Kenton 10 cents a thousand cubic feet more than they are charging Ada. Now, what is the reason for that?

A. Well, I can't tell you that, in that particular case.

Q. At the gate, and they are getting it at practically the same gate?

A. There may be some condition that influences us; I don't know.

Q. Well, you are a practical expert. I would like to have some reason for it.

A. Well, there may be some reason that I don't know of, but I can't see any.

Q. Can you imagine one?

A. Yes. It might be that near that town there is some gas that is being produced from the Trenton rock; that is up in that country. That doesn't last long, producing gas for a few years or a few months perhaps, [copy illegible] load there and they could enter into a contract for selling

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[fol. 724] gas at a cheaper rate temporarily. There might be some condition of that kind that I am not familiar with. Trenton rock gas up in that country doesn't hold up very long, and there is being some Trenton rock gas found in northwestern and western Ohio.

Q. Is there any reason why you would give one town the benefit of that and deny it to the other?

A. Not unless there was some condition to influence it that I am not familiar with.

By Chairman Geiger:

Q. Would the fact that the distribution plant in the cities which the Judge has referred to is owned by the Insull Company in Chicago have any effect on the price charged? The Insull Company, as I understand, has no gas distributing system in Ohio?

A. None that I know of.

Q. No producing or transportation system?

A. I don't know of them having any.

Q. But they are buying their gas from a real rival gas business, and they buy it from the Ohio Fuel Gas Company.

A. The Insull is buying from the Ohio Fuel Gas Company at a certain price.

Q. Yes.

A. That shouldn't make any difference in the price, because the Insull Company is a competitor; I don't see why it should. I am fixing my price on what I believe. I believe gas at 45 cents at the gate of any city is low. There is no doubt you can find a market.

Mr. Mullin: It hasn't appeared in the record yet that the price charged to the Insull Company is 55 cents, a difference of 10 cents, being higher instead of lower. That is the fact, is it not?

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[fol. 725] Commissioner Geiger: Yes, sir.

By Mr. Mullin:

Q. Are the prices to which you testified as the going price and general market value those that prevail in contracts and dealings between companies dealing at arm's length?

A. Yes, sir.

Mr. Mullin: That is all.

By Commissioner Bricker:

Q. Where are those companies that are dealing at arm's length?

A. The companies that are buying from the Ohio——

Q. I say, name some of them?

A. Well, I have seen a list of them this morning, but I can't offhand give them. There are various companies that distribute the gas in these various towns in Ohio, and they are buying from the Columbia Gas & Electric.

By Mr. Mullin:

Q. And a transaction with the Insull Company would be such a transaction, would it not, dealing at arm's length?

A. It would.

By Commissioner Bricker:

Q. Would you consider the Dayton Power & Light Company as dealing at arm's length with the Ohio Fuel Gas?

A. Why, from my knowledge of the operations of the various branches of the various companies, each branch strives to make as good a showing as it is possible for it to do; and I presume they try to buy gas from the Columbia Gas at the lowest price they can drive; make the best contract they can drive.

Q. By a good showing just what do you mean?

A. That if they are a branch of the Columbia Gas, a branch or unit, or associate or anything, at the end of the year as any other——

Q. The gas rate doesn't have anything to do with the

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[fol. 726] earning, does it?

A. Well, if they bought gas at 25 cents and distributed it at 50, their earning would be greater than if they were

buying at 45 cents and distributing it at 50. That is what I have in mind.

Q. If they were buying at 45 cents, though, they are entitled to a certain earning upon their property used and useful.

A. Well, that is true, yes.

By Chairman Geiger:

Q. And what difference would it make what they earned if the common stock of all the companies belonged to the same parent company?

A. Well, there is a pride of each branch of wanting to make its unit show up as well as any other unit in the organization.

Q. Well, do you think the pride of each branch, all of which branches belong to the same parent company, would have any effect on the market value of the gas? It wouldn't be competition, would it?

A. It wouldn't have any effect on the market value, no, sir.

Q. That is each local company would say, "I would like to make a good showing for the local company; please give me gas at a little less rate than you give it to somebody else"; the parent company would say, "No, you have all got to stand on the same ground, and we will give it to you all at 45 cents"?

A. Well, I don't think they do; I don't know. I can't tell.

Q. How many producing and distributing companies are there in Ohio, now operating in Ohio?

A. I can't answer that, but there are——

Q. Well, the Columbia Gas Company is the holder of the stock of what companies that are producing and distributing?

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[fol. 727]

A. They are the holders of the stock of the Ohio Fuel Gas, that is a distributing company; I think the East Ohio is a distributing company——

By Mr. Mullin:

Q. Is that Columbia?

A. Yes, Ohio Standard — they are the two principal producers and distributors of gas in Ohio. There are some few smaller companies.

Q. Upham Brothers also produce gas and sell it, do they not?

A. Well, Upham Brothers now are owned by the Alleghany Valley; one of P. W. Chapman's companies. That is another producing company. Then there is the American Commonwealth Power, another producing and distributing company.

Q. How about the Arkansas Natural Gas, represented by Mr. Dalley?

A. Yes.

Q. To whom were the Whitmer properties sold a couple of years ago?

A. They were sold to Dalley through what was known as the Pen Ohio.

Q. That is also a producing company in Ohio?

A. It is a producing, but I don't know about distributing.

Q. And there are others, are there not?

A. Oh, there are a great many producing companies; but producing and distributing——

By Chairman Geiger:

Q. Well, do all distributing companies own the main transportation pipe lines to the points where they charge the gateway price, do they not?

A. Yes, sir.

By Mr. Mullin:

Q. The distributing company?

A. No; the producing company.

By Chairman Geiger:

Q. I mean transporting companies?

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[fol. 728] A. Transportating companies.

Q. Take the word distributing out. Transporting companies own the pipe line; so that there can be no competition between a town which has one pipe line from which it receives its supply, and any other towns that receive its supply from another pipe line or a company owning another pipe line; in other words isn't that true, that the company that owns the transportation pipe line to any town

practically has a monopoly upon the distribution of gas in that town; nobody else can get to the town except the owner of that pipe line?

A. Well, if there was gas could be found in sufficient quantities to lay a line to that town, there would be plenty of capital to finance that pipe line and transport that gas if they could get a fair price for it in the town.

By Commissioner Bricker:

Q. Are any of the companies which you have mentioned here producing in Ohio or distributing in Ohio in a position to compete with the Ohio Fuel Gas Company in furnishing gas at wholesale to any of the towns here under consideration?

A. Any of the companies that have been mentioned, yes.

Q. Which one?

A. East Ohio, American Commonwealth Power, Pen Ohio; well financed and well capable of competing with them if they could find the gas to justify laying the pipe lines.

Q. Has any of the companies which you have mentioned a pipe line into this territory?

A. The Commonwealth Power, yes.

Q. And where does it run?

A. It is local around Zanesville and Newark. Newark

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[fol. 729] and Zanesville are its principal points. They are a new company here; they only have been in here about two years, and they are spreading out.

Q. Are they supplying gas to any towns in Ohio——

A. They are supplying industrial lines at Zanesville.

Q. Just industrial gas?

A. And some domestic at Newark and surrounding territories, and industrial at Newark.

Q. Do they distribute that themselves?

A. Yes, sir.

Q. Or do they contract with a distributing company?

A. They distribute it themselves.

Q. Do you know whether or not they are furnishing gas to any local distributing company at the gate of any city in Ohio?

A. Not that I know of. I don't think they are, no. There is a demand for gas in Ohio——

Q. Do you know what their industrial rate is in Zanesville?

A. It is 45 cents unless there has been a change.

Q. And the same in Newark?

A. At Newark I can't say. I sold that company to Chapman, and the rate at that time was 45 cents, and one of the consumers told me he would give a dollar rather than lose it, and he was using as high as a million and a half a day.

By Chairman Geiger:

Q. Is that what you based the rate on; what people would give?

A. No; it was what they are giving, and the demand for gas.

Q. Well, that is the element that you take into consideration, the demand for gas, in fixing the price. What consideration do you give in estimating as to what the value of gas is at the gateway to the cost of producing and transporting the gas?

A. I think 45 cents is low. It is the minimum that should be received taking into consideration——

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[fol. 730] Q. That was not what I asked you. In estimating that 45 cents is low for gateway price, what consideration do you give to the cost of producing and transporting gas?

A. That is taking into consideration the cost of production and transportation.

Q. And also the demand, of course?

A. And the price that can be received; the going price that can be received.

Q. Do you know whether or not any of these companies of which you have spoken are purchasers of gas which they do not produce?

A. They are.

Q. And what field do they buy from?

A. All through Ohio.

Q. From what sort of companies do they buy?

A. Well, they buy——

Q. Small producers?

A. Small producers.

Q. The man that may have a well upon his place that is worth piping, or something of that kind?

A. Yes; some man or two or three men go out and drill for oil perhaps and find gas, and then want to market their gas and the company will lay a line to their lease and take the gas.

Q. And what do they pay for it?

A. The price for that has been usually within the last few years 15 cents, but the price is constantly going up. It is around 18. All the gas they are buying now I believe they are paying 18 and 20, and some talk of 22 and 22½ now.

Q. Well now, there is a market and a market price for the purchase of gas at wells throughout Ohio by the distribution lines, is there not; there is a market by which those who have gas at their small wells may get a customer?

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[fol. 731] A. If they have sufficient quantity of gas to justify laying a *laud* from the main line to their lease, there is a market for it.

Q. Now, is there competition between these several pipe line companies to purchase this gas?

A. There is.

Q. That puts the price up or down?

A. That puts the price up.

Q. Let us suppose, for example, that there is a small producer that has a comparatively small well and he is near only one pipe line, transportation pipe line; now the price that would be offered to him would be less than the price that would be offered to him if there were two competing transportation lines seeking to buy his gas?

A. That is not true unless the policy has changed since I left the company. It was our policy that when we increased the price to one producer we increased the price to all, no matter what the contract price was. I believe that you will find now they are paying 15 cents to people whose contract calls for five cents. We increased those price gratuitously in 1915, I believe, from five to ten cents the first of the year to try and induce people to go out and produce gas for us in some quantities. We thought it might serve as an inspiration. It didn't bring the results, and

May 1st the same year we increased the price from 10 to 15 to everyone, and that didn't get the result. We found that the small producer was not interested so much in producing gas; he couldn't finance a program of producing gas in any quantities that amount to anything.

Q. Well, now, how much did you finally have to pay them 950 [fol. 732] in order to induce the small producer to embark in the enterprise of producing gas?

A. We never attempted it after raising it to 15 cents. We found it didn't get results and we just ignored his product, and figuring at the beginning of the year the amount of gas that we would need to carry us through the following winter, we never gave the independent producer a thought. We simply figured that we must produce that gas, and then if there was some that we could get from the producer, take it.

Q. Well, you wouldn't be willing to pay him more than 15 cents?

A. I can't say. At that time I wasn't doing it all; I was in conference with the officials, and they might have been willing to pay more if it had served as an inspiration to go out and help us get that big load.

Q. I understand you stopped increasing the price at 15 cents?

A. Yes. We increased it from 5 to 15 and we found it didn't get any results.

Q. And then stopped?

A. Stopped.

Q. And you stopped because you could produce it yourself at 15?

A. No, we didn't stop because we could produce it at 15. We stopped because we felt that we must bear the burden, we must take the chance, spend the money and go out and find the gas and not depend on someone else.

By Commissioner Klinger:

Q. Have you any idea what it costs you to produce it yourself?

A. No, I haven't. I never went into those figures.

By Chairman Geiger:

Q. Well, wouldn't it rather naturally follow that if you wouldn't offer more than 15 cents for gas produced by the

small producers, that you could produce it yourself for
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[fol. 733] 15 cents?

A. No, no; I don't consider it follows at all. We wanted help, and we were having trouble finding gas and we wanted help, and we were trying to inspire the smaller ones in numbers to go out and help us. We found they were not interested.

Q. The limit of your inspiration though, was 15 cents?

A. Well, at that time, yes.

Q. Beyond that you wouldn't inspire them any more?

A. We would if we thought it would bring any results, but they were not interested. It requires considerable capital to go out and take a large block of leases and develop them.

Q. The gas as it comes out of the well is known as wet gas, is it not?

A. No.

Q. Well, what is wet gas?

A. Wet gas is casing head gas coming off of oil.

Q. A gas well has no gas from which gasoline may be produced?

A. They extract a little gasoline from what we call dry gas, but very little.

Q. But there is enough to use the system by which you can extract the gasoline from if, is it not?

A. They do take the gasoline from the dry gas, yes, sir.

Q. Well, they do very extensively, do they not?

A. They do. They treat most all, generally all of the gas and take what gasoline it produces.

Q. Well, is this gas that is distributed to points in Ohio gas from which gasoline has been extracted?

A. I can't say that it all is. Probably the most of it has been treated; some of it may have been purchased locally that doesn't go through their plants, their system, and that
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[fol. 734] may not have been treated.

Q. But the major portion of the gas which is distributed at the gateway at 45 cents is gas less the gasoline?

A. I think it is, yes, sir.

Q. Now, do you know how much profit they make out of taking the gasoline out of that gas?

A. No.

Q. What other by-products do you get out of gas that they can take from it and still sell the gas as domestic or commercial gas?

A. I don't know of any.

Q. Is gasoline the only product?

A. The only one I know of; the only one that I know of that they are taking out.

Q. Well, taking the ordinary gas from gasoline fields in Ohio, how much gasoline can be gotten from a thousand cubic feet of gas?

A. Well, I think that is about a half a pint to the thousand cubic feet. I don't know whether I am right or not; I think that is right.

Q. A half a pint?

A. I think it is about a half a pint on the average. At one time I measured the number of cubic feet that was going through the plant and the amount of gasoline that was taken out; and I wouldn't give that as an absolute figure; it was so long ago.

Q. Well, you don't know what the profits of extracting gasoline of what gas is from the wells of Ohio?

A. I know it is very small. There is parts of the——

Q. They have what they call the cracking system, haven't they?

A. Well, that is the system by which they treat the gas; but a large part of the gas of Ohio, particularly southern Ohio, has no gasoline at all; it is strictly dry. Gas from northern Ohio has more gasoline, but there is parts of Ohio

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[fol. 735] gas——

Q. Well, do you get a good deal of this gas from wells which are producing oil at the same time?

A. No, sir.

Q. All strictly gas wells?

A. Mostly, yes, sir.

Q. There is no other by-product?

A. None that I know of.

Q. To whom does the profit of the by-product go? Some corporation that is organized and stock held by the producing company?

A. Profit from the gasoline?

Q. Yes.

A. Why, I suppose it goes to the producing company.

Q. Either directly or through some subsidiary corporation?

A. I suppose so.

Q. Now, in Ohio there are no carbon black——

A. I think there is a small one up in Coshocton; I don't know if it is operating now or not.

Q. Well, after you make carbon black the gas is consumed?

A. Yes, sir.

By Commissioner Bricker:

Q. Where is the processing plant of the Ohio Fuel Gas?

A. One of them is at Sugar Grove.

Q. How many have they in Ohio?

A. I can't state that. I suppose they are treating it at each one of their compressing stations of any size; I suppose they have a gasoline plant.

Q. Has there been any improvement in recent years or in the last two or three years in this process of extracting gasoline?

A. I don't believe there has.

Q. You know of no improvement by which a greater quantity of gasoline may be extracted by the cracking process?

A. I know of no such improvement.

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[fol. 736] Q. Do you know whether the B. t. u. contents of the gas furnished is taken into consideration by the producing company in fixing the gateway price?

A. I don't know that; but I don't believe it is.

Q. Would there be a variance in the B. t. u. content of gas furnished to these various towns?

A. I don't think there would be any difference.

Q. Would there be a variance in the B. t. u. content of gas supplied from the southern Ohio field and the northern Ohio field that you mentioned a moment ago?

A. If there is a difference it is all mixed; it all goes into the one station, Sugar Grove station, passes through that and——

Q. Comes out of there substantially uniform then?

A. Substantially uniform.

Q. Is the B. t. u. content of the gas as produced affected by the extraction of the gasoline content?

A. Not to speak of; very slightly the experts have informed me.

Q. Just as much gas left of the same heating units then as prior to the treating process?

A. There is a very slight difference I am told, but not much.

Q. So that the product then, the by-product of the gas that is extracted at the processing plants would be practicaly a whole profit to the company, taking into consideration, of course, the cost of the extracting process?

A. I think so.

Q. The remaining gas is worth substantially the same as if piped direct?

A. Substantially the same.

By Chairman Geiger:

Q. Are you familiar with the plant at Marietta?

A. With the plant?

Q. Yes, with the processing plant?

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[fol. 737] By Commissioner Klinger:

Q. For extracting gasoline.

A. No, I am not. I don't know of any plant they have in Marietta.

By Mr. Mullin:

Q. Mr. Webber, is it possible to get any considerable amount of gas from the small producers that you have mentioned?

A. No, sir.

Q. Could a supplying company depend upon that supply of gas to take care of their winter peaks and so forth?

A. They could not.

Q. What is the fact as to there being additional expense beyond the price paid in order to get that gas?

A. Well, it is necessary for the purchasing company to extend its gathering lines, its field lines to a lease to gather that gas, establish a meter to measure it and maintain the meter, and maintain the line.

Q. Then the expense of getting it is a considerable item to be added to the price which is paid to the producer, as I understand it?

A. Yes, sir.

Q. What experience, if any, have you had showing an increase in the price which the gas companies are willing to pay producers if they can get a considerable amount of gas?

A. Well, I know of one place where there are six wells with an open flow of about six million. There are two different companies offering to take all the gas they have now, or all they may produce, and pay them 20 cents, and intimating that they might pay more.

Q. Open flow doesn't indicate, of course, how much the well will actually put into the supply?

A. No.

Q. What fraction of the open flow will a well put into

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[fol. 738] the line carrying average line pressure?

A. Well, I think that a conservative figure is 33½ per cent.

Q. As to the gasoline extracted from the gas; if gasoline is not extracted from the gas what, if anything, happens in the transmission line?

A. Well, it interferes with the transmission because of the rubber couplings becoming saturated and drying out, and causes leakage; and then the gas, I believe, throws off less foreign substance in the use in the home.

Q. If you do not extract the gasoline, what happens to the stoves, for instance, in the home?

A. They become carbonated, and interferes——

Q. It is an advantage then, is it, to the consumer to have the gasoline extracted?

A. Very much so.

Q. You mentioned the cracking system, or rather it was mentioned in a question to you and you answered it. Does the cracking system apply to gas or to oil?

A. Well, I think it applies more to oil; entirely to oil. They have different systems, and I am not an expert on extracting gasoline from gas. I only know in a general way.

Q. Do you know in a general way that the reduction in the B. t. u. from the extraction of the gasoline from this gas such as the gas wells of Ohio produce, is practically nil?

A. Yes, I know that from inquiry of men that do have it.

Q. Do you know as a matter of fact or do you not know—maybe I am asking too direct a question; have you any in-

formation, Mr. Webber, as to gasoline extracting companies having made profits or sustained losses by extracting gaso-

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[fol. 739] line from the dry gas of Ohio in the last few years?

A. I don't know whether there is a profit or a loss.

Mr. Mullin: That is all. Cross-examine.

By Chairman Geiger:

Q. You have testified that the difference between domestic consumption price and the industrial consumption is due to the fact that the domestic must provide for peak loads and different amounts in consumption through different periods of the day and year. Now, does the same pipe line, the same distribution plant, supply the industrial consumer that supplies the domestic consumer?

A. Well——

Q. Your gas goes through the same pipe from the wells to the gateway?

A. It undoubtedly does, yes.

Q. Well, they certainly don't have two pipes——

A. Oh, no, not running to the town where the plant is located, no. But of course they have a line extending from the city plant to the industrial plant.

Q. Yes.

A. But the——

Mr. Matthews: Wait, Your Honor. I want the witness to complete his answer.

The Witness: I had in mind, for instance, supplying some town or industry, one company supplying the domestic consumer and another take on the industrial market, then lay a line there for the purpose of supplying, as is done in Ohio and other places, for the purpose of supplying that industrial consumer. He could be assured of a regular demand, constant demand, and he would be justified in laying a line from the producing wells to that town to supply that industrial market at a lower price than the company would be justified in laying a line from its field to that city to

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[fol. 740] supply the domestic consumers. I had that in mind when I made the difference.

By Commissioner Klinger:

Q. You speak about a justification of charging a lower rate to the industrial than to the community or the community service because the industrial was the more dependable and more reliable. Isn't the contrary true; that industries are subject to shut-downs because of industrial difficulties; they are even subject to being entirely closed down and your entire business lost? Isn't there a bigger hazard there than there would be to serve a community?

A. No, I don't consider it that way.

Q. Isn't at this particular time half of the industries in the state of Ohio practically closed?

A. Well, if that industry shuts down, then you are not bound to be there with the gas. You can use it at some other point. But what I had in mind when I answered the question as I did, that when they were running, the contract provided that they would take a certain amount of gas, and usually their contract does agree to take a certain amount during a year, a certain amount each month of 12 months of the year, and if they fail, then the company would have a claim against them for what they didn't take. But should that not be in the contract, if they didn't take it they could use that gas at other points to take care of their domestic consumers. That wouldn't affect the price.

Q. Isn't the domestic consumer the real stabilizing influence; the dependable factor in the business?

A. Dependable factor, yes, sir; but it costs more——

Q. And isn't there more hazard with the industrial line because of the industrial problems, shut-downs, and en-

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[fol. 741] tirely discontinuing their operation?

A. I don't consider it so. I consider that the domestic consumer, as you say is dependable, but the load is so varying that it costs more money to provide for his gas than it does to provide for the industrial market.

By Chairman Geiger:

Q. Well, assuming that to be true, that there is a variation in the peak in the domestic consumption, and after you have once provided the equipment to take care of the peak, is there any advantage to sell the other gas to the lower priced consumer rather than save it and consume it

by the domestic consumer, where you have already equipment enough to serve him; is the idea that you want to sell all the gas you can during a given year no matter at what price you may sell it or conserve your gas and make it supply the domestic consumer over a longer period of years?

A. Well, there is reason in your question, but I wouldn't agree with it; for you have to go to the expense to get that gas to the mouth of the well, and you have that investment there. If you carry it over a long term of years something may happen to those wells; a packer leaks, water gets down in that well, destroys the gas well. You are exercised about the investment you have there and you want to take that gas out and make use of it. The gas that you are holding back for that future consumption is in adjoining leases, in the intervening territory that hasn't been drilled.

Q. In other words your theory is that the better plan for the company is to sell all the gas they can as fast as they can sell it at a profit?

A. Well, I wouldn't put it just that way. To provide

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[fol. 742] gas in the summer of 1930 with the winter gas of 1930 and spring of 1931, and then the next year go out and get that gas again for them in 1931 and '32, and dispose of it, and conserve your gas in the ground.

Q. Wouldn't this be true, that the gas company would rather take the surplus gas that it has in the summer of 1930 and sell it for industrial purposes than to conserve it for the later drain upon it in the winter of 1930 and 1931 for domestic purposes?

A. I don't think that is the view the company takes of it.

Q. At any rate, your theory is this, just as it is in the distribution of electricity, that you will charge the domestic consumer at the rate that it would take him to supply his peak load, and charge against him during the entire period whether he burns peak load or not, the price that would be necessary to furnish him gas at the peak load?

A. Well now——

Q. You don't give him any advantage of the fact that he is not using your gas?

A. As to the figures, I don't think they use that thought as the basis of their price at all. I think it is the average price, average amount over the year. I don't think they make it the peak load condition.

By Commissioner Bricker:

Q. You mentioned a moment ago, Mr. Webber, that for the future consumption and as a conservation for domestic consumption in years to come, that that gas on which you are going to rely was in adjoining leases, in intermingling, I think you said, territory. What do you mean by that?

A. Well, for instance you have a hundred wells that occupy a hundred acres to the well, and then you have 100 acres or 320 acres of territory in between these wells

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[fol. 743] sprinkled in amongst them that you consider producing territory.

Q. By that you meant that they would be developed at a future date, or that that gas might be drawn upon from the wells that were already drilled?

A. It might be developed at a future date.

Q. Over how many acres generally speaking will a gas well draw gas?

A. That varies. I have known of gas drawing from a large area, a few wells draining a large area of territory. But that——

Q. Could you be a little more definite; could you say acres instead of area?

A. Area of acres.

Q. How many?

A. Well, I can give an illustration——

Q. Give the average?

A. I will give one that I know of. There is an area—I have testified to this before and I have it in mind, in Harrison Township, Knox County where the Ohio Fuel had some very good wells that produced open flow on an average of around 2,000,000 cubic feet. It is an area there of about a mile in diameter in the center. These wells had fallen to about 150 pounds rock and with an open flow then of about 200,000, and we conceived the idea if we went inside of this circle here we would get another of these 2,000,000 wells. This territory had been drained for eight or ten years. We went to the center and found the same thickness of sand, of the same depth, but it had the same rock pressure as these surrounding three or four wells, and the same volume; so that was evidence to me if we had drilled

that ten years before at that spot, we would have had the two or three million foot well with a rock pressure of 800

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[fol. 744] pounds, but it had been taken out of that area; removed.

By Commissioner Bricker:

Q. By the wells a mile away?

A. By the wells a mile or so away. But now that wouldn't hold good in all cases. In the Clinton sand—I know of another place in Ohio where large volumes of gas have been taken out in Wayne County, and a mile and a half away from that the pressure was down to 150 pounds; a mile and a half from that the East Ohio had a well that had an initial rock of about 900, and a volume of about 3,000,000. There was a lens in that rock that hadn't been disturbed; but generally gas will draw from considerable area of territory.

By Mr. Mullin:

Q. What does that mean; considerable area?

A. Considerable area of acreage.

Q. How much would you say?

A. Why, I think, unless there are small lenses in the rock, five wells would drain 2000 acres. That is offhand without giving it so much thought; but I don't think there is any question about that.

By Commissioner Bricker:

Q. Then do you find that the gas is possibly moving in the sand or is it a fixed——

A. No, it is there in the sand, and when you taop that rock, it begins to move toward that hole.

Q. Drawn in towards that hole?

A. Yes, sir.

Q. Do you ever find competing companies drilling counter wells to offset a drain of that kind?

A. Oh, yes; and to the loss of all concerned.

By Chairman Geiger:

Q. Do I understand you to say that in Ohio the average drain from a well would be 400 acres?

A. I wouldn't say that, Judge, no; the average drain, no. I think it would drain—the conditions vary; I wouldn't say——

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[fol. 745] Q. What is the average now; if you were sinking wells, taking an option upon say gas territory, that was uniform; would you feel that you were sinking too many wells—you have produced gas?

A. Yes, sir.

Q. If you sunk wells to every 20 acres?

A. Oh, yes.

Q. Too many?

A. Too many. I would say at least a hundred. We try to space our wells in fields where—in the Vinton County field where we had a great many wells, we try to space them at least a hundred acres apart.

Q. A hundred what?

A. A well to each hundred acres; and we took the gas out, too. Those wells were very good wells, and they have gone down throughout that whole field. You will find it is about uniform, the initial rock was around 850 to 900 pounds. I can't say today, but I will think you will find that around 200 to 250, and all the wells about the same, showing that it is all coming out of the whole area. And not less than 100 acres to a well from an economic standpoint; I have seen so much money—McKeesport is an illustration of it, Alexandria——

By Mr. Mullin:

Q. What happened to McKeesport?

A. Why, the engineers have estimated there was twenty-four millions of dollars spent—twenty-three millions of dollars spent and four millions taken out; $19,000,000 lost. Alexandria, a little town near Newark in Licking County; I was in that in 1913 or '14, and I went in there foolishly and took city lots; we lost money right around Alexandria and everybody else that was in there, drilling wells too close. You will get from a well, for instance, 200,000,000 cubic feet in its lifetime if it is given a hundred acres. Well,

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[fol. 746] if you drill ten wells you only are going to get one-tenth of 200,000,000 and selling gas at 20 cents you won't get your money back. If you have one well and get 100,000,000 and sell gas at 20 cents you will get some money.

By Chairman Geiger:

Q. What is the average depth of the wells in Ohio?

A. In the Clinton sand, around 2500 in central Ohio. As you go east they are much deeper.

Q. What is the average cost of drilling wells?

A. The average cost at this time I would say was about $7,500 in central Ohio. Over in around Zanesville those wells are costing around $15,000. They are 4000 feet deep.

By Mr. Mullin:

Q. The Clinton, of course, is the great producing gas sand?

A. Clinton sand is what we think of entirely in getting gas in Ohio.

By Commissioner Bricker:

Q. Has there been any development below the Clinton sand in Ohio?

A. There have been several wells drilled to the Trenton rock in central Ohio, and I don't believe there has ever been a gas well that paid; one or two oil wells, but surrounded by dry holes. I don't consider there is any producing paying sand below the Clinton.

By Mr. Keyt:

Q. Do you have the list of towns on which you made up the 45 cent gas rate?

A. I haven't it with me. I have seen them.

Q. Did you make this examination yourself?

A. No, they are figures that were given to me, made up by Columbia Gas & Electric Company, figures showing——

Q. This list is made up by the Columbia Gas & Electric Company?

A. They gave me the figures that these towns were paying them and other companies.

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[fol. 747] Q. Then you don't know whether there is a lower gas gateway price outside of the list furnished you by the Columbia Gas & Electric Company?

A. Well, no, I don't know—I know pretty well what the rates are in Ohio.

Q. You haven't made any——

Mr. Matthews: Let the witness finish.

The Witness: I know very well what the rates are in Ohio in the smaller towns.

Q. But you made it up just from this list furnished you?

A. Oh, no, my general knowledge——

Q. What towns——

Mr. Mullin: Let the witness finish.

The Witness: My general knowledge of the last 25 years.

Q. Do you know of any town that is furnished that buys its gas at a lower rate?

A. Than 45 cents?

Q. Yes.

A. Yes, there are a few towns; but the average will be above 45 cents I am safe in saying.

Q. What are those towns?

A. Well, I can't name them offhand. Of course, I noticed in this list there was one—I noticed in the list that I went over this morning I think there was one little town of 200 population had a short term contract of maybe 40 cents, I am not sure of that. But I will testify that the average price at the gate for the towns in Ohio is 45 cents and upward.

Q. I give you this list and ask you if this list is what you made up——

Mr. Mullin: Is that Exhibit 10, Mr. Keyt?

Mr. Keyt: I don't have it marked here. It is a list that you furnished us.

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[fol. 748] Mr. Mullin: It is a copy of an exhibit that is in evidence?

The Witness: I want to correct my statement as to the price of gas at Portsmouth, I wasn't sure. It is 39 cents. This is the same list that I saw, yes.

Q. And this exhibit 13 is the same list from which you made up the gateway price of 45 cents?

A. I didn't make the gateway price up from that list.

Q. I mean from which you made an average?

A. I didn't make any average from that. I looked that list over. The price I gave is from my knowledge of conditions and prices in Ohio, the going——

Q. You don't know——

Mr. Matthews: Let the witness finish.

The Witness: The going price in Ohio.

Q. But you do not know of any town that you can recall at the present time that has a lower gateway price?

A. There may be towns that have a lower price, but I don't know of them. But I fix this as about the average, above 45 cents.

Commissioner Klinger: Just answer his question and quit.

By Mr. Keyt:

Q. How recently did you make such an examination of the average of 45 cents, outside of this list?

A. I have made no examination, but I keep in touch with conditions.

Q. How recently?

A. Constantly, day after day.

By Commissioner Bricker:

Q. Is the information upon which you came to your conclusion any more accurate than the knowledge of the price at Portsmouth?

A. Well, my information that I arrived at my opinion, I think is accurate as to conditions in Ohio. I had that Portsmouth figure from glancing that over this morning, and it didn't make much of an impression on me. I had the figure

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[fol. 749] 9 in mind, and I made it 19.

By Mr. Keyt:

Q. Do you know the price in Findlay?

A. I don't recall it just now.

Q. Do you know the price in Hamilton?

A. Hamilton is something over 40 cents.

Q. Do you know the price in Cincinnati?

A. It is something—that is around 45; between 40 and 45.

Q. Do you know the price in Columbus?

A. I do not know the price they are paying in Columbus—the price here, domestic?

Q. No, gateway price?

A. I don't know what it is.

Q. The price at Athens?

A. Yes, something over 40, around 50 as I remember it, 50 odd.

Q. Bellefontaine, Ada?

A. Well, that is something over 50. Those prices up in there are invariably from 40 to 55.

Q. Do you know what kind of gas is used for domestic and manufacturing purposes in Bellefontaine?

A. What kind of gas?

Q. Yes.

A. No, I don't.

Q. You don't know whether or not it is artificial or natural?

A. I can't say on that, no.

Q. Could you say what the gateway price of gas was in Bellefontaine?

A. Well, I think it is in that list there, isn't it? I looked it over this morning.

Q. I didn't ask you that.

A. I said about 50 cents.

Q. But you don't know whether it is artificial or natural gas in Bellefontaine?

A. Well, I am sure they are not selling artificial gas at 50 cents.

Q. Then you don't know then?

A. No, I can't say, no.

Mr. Keyt: All right, that is all.

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[fol. 750] By Mr. Klapp:

Q. Mr. Webber, is there any company in competition with the Ohio Fuel Gas Company in this territory affected by this proceeding?

A. In competition with them in selling gas.

Q. Yes, wholesale gas?

A. I don't know of any company unless it is some small company. There is one small company up in the northwest there that produces a little gas lately, but I don't know who they are selling it to.

Q. It wouldn't be in a position to compete with the Ohio Fuel Gas Company for furnishing that volume of gas there?

A. No, no. That is where gas gets its price, there isn't the quantity of gas to be found to compete with it.

By Commissioner Bricker:

Q. Do you find that gas is in very active competition with electricity in these various communities for domestic use?

A. Well, I don't think that electricity for heating purposes is competing so much with gas because of the difference in price.

Q. Mr. Webber, does your business keep you practically in touch with gateway prices of gas in Ohio?

A. Yes, in a general way in buying gas properties, and then seeking markets for the gas that is being produced. I try to familiarize myself with where there may be a market for gateway gas or industrial gas, and at what price I might be able to sell it.

Mr. Klapp: That is all from the municipalities.

By Mr. Mullin:

Q. Mr. Webber, a moment ago you said that a list of the gas rates and so forth which was shown you you had seen or received a copy of from the Columbia; you got it from the Dayton Power & Light Company?

A. Dayton Power & Light Company.

[fol. 751] Ohmer E. Howland testified:

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[fol. 752] Mr. Howland, does the Dayton Power & Light Company produce any gas?

A. It does not.

Q. Does it own any gas lands?

A. It does not. The Dayton Power & Light Company purchases all of its gas wholesale at 45 cents per M. C. F. in accordance with the contract.

Q. From whom does it purchase it?

A. Ohio Fuel Gas Company.

Q. Have you got the contract here?

A. Yes, sir.

Judge Matthews: Now we produce here the contract. We have copies of it here. What is this? The original? Let us have the copies. Now we introduce the contract between

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[fol. 753] the Dayton Power & Light Company and the Ohio Fuel Gas Company, dated August 1st, 1928, for gas sold to the Dayton Power & Light Company wholesale at what is known as the city gate rate of 45 cents. That will be Exhibit No. 9, and we ask for permission to substitute a copy for the original, as we do not care to take the copy off of our files.

Chairman Geiger: All right.

Judge Matthews: Exhibit No. 9 includes the contract for gas at North Hampton Piqua, Sidney, South Charleston, Tippecanoe, Troy, Wilberforce and the territory outside of Troy, and the contract runs for—well, the contract is still in effect and speaks for itself as to what the limit on it is.

And thereupon the contract above referred to was offered, introduced and admitted in evidence on behalf of the Dayton Power & Light Company, and is herewith submitted, marked company Exhibit No. 9, and made a part hereof.

Judge Matthews: We also introduce in evidence Exhibit No. 10, a contract dated January 1st, 1927, between the Dayton Power & Light Company and the Ohio Fuel Gas Company, for the supply of gas at Washington Court House and the village of Bloomingburg and certain rural consumers, at the rate of 45 cents per thousand cubic feet, which contract runs until midnight, December 31st, 1928. It has expired by its terms, and Mr. Howland will explain that we are still operating under that, however. And we would ask to submit a copy for the original.

Mr. Browning: That may be done.

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[fol. 754] Judge Matthews: It is done by consent.

Commissioner Bricker: The record may show that copies will be admitted.

And thereupon the contract above referred to was offered, introduced and admitted in evidence on behalf of the Dayton Power & Light Company and is herewith submitted marked company's Exhibit No. 10, and made a part hereof.

Q. Mr. Howland, will you please explain about the contract under which we buy gas? Please explain about the contract for gas at Washington Court House, which, by its terms, ran until December 31st, 1928?

A. The contract for the supply of gas which was used at Washington Court House was made with the Ohio Fuel Gas Company under date of January 1st, 1927, and expired at midnight on December 31st, 1928, but we are still operating under that contract. This contract provides for the purchase of gas at the gate rate of 45 cents per one thousand cubic feet.

Q. There has been a good deal of reference here, Mr. Howland, to districts. What are the gas districts that have been referred to in evidence? Please elucidate that.

A. Our property is operated in what we call districts. Take the entire company, we operate what is known as the Dayton district, which is presided over and looked after by our district manager, or by the manager of our gas division, Mr. George Light, in connection with his other duties in a supervisory capacity of other districts, which consists of the Xenia district, in which are located the following towns—

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[fol. 755] By Chairman Geiger:

Q. Is Wilberforce in the Xenia district?

A. It is.

Q. That is all we are interested in?

A. Wilberforce and South Charleston are in the Xenia district.

By Judge Matthews:

Q. Go on.

A. Then we have the Wilmington district, which involves the villages of Wilmington and Melvin. The Piqua district which involves the city of Piqua, Sidney, both of which are in these proceedings, Bradford, Covington, Fort Loramie, Minster, New Bremen, Pleasant Hill, Tippecanoe City, a part of this proceeding, Troy, a part of this proceeding, Versailles, West Milton, New Knoxville. In the Washington district, the cities and towns of Washington C. H., Bloomingburg, Jeffersonville, Greenfield, Sabina and Sedalia. The city of Washington Court House is in this proceeding. In each of these districts there is located a district manager who has direct supervision over these properties.

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[fol. 756] By Chairman Geiger:

Q. Still referring to page 10 and taking the total operating expenses, you have $697,529.00 and $537,081.00 of that is for gas?

A. Yes.

Q. That leaves a balance of $160,448.00, which is expenses exclusive of the purchase of your gas. Now the per cent of that is 37.243. Does that mean that if we take all of the funds you were reserving for that purpose, we would have about $480,000.00 a year collected and reserved by the company for these various purposes, being three times what you have here?

A. No.

Q. Isn't it true that you have allocated to those particular eight towns $160,000.00 of expenses?

A. I will check your figure.

Q. $160,448.00 exclusive of your gas?

A. Yes, those are the expenses outside of the purchase of gas that are allocated to these eight towns.

Q. What is it?

A. Those are the expenses outside of the purchase of gas which are allocated to these towns, which includes your depreciation, taxes—no, it does not include taxes.

Q. But assuming that the proportion that you are allocating to these towns is 37.243 per cent——

A. That is not the proportion.

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[fol. 757] Q. To the Piqua district?

A. That is not the proportion.

Q. I understood you said it was?

A. I said that was the proportion of the city of Piqua to the Piqua district.

Q. Well, what is the proportion of this Piqua district to the entire ownership of your property?

A. I couldn't tell you offhand.

Q. It is 17 per cent of 47; that is what you have been going on——

A. No, that I testified was on this valuation.

Q. All right, let's get that so that we know what you are doing here. Let me ask you just one or two questions about this contract which I would like to understand, and then we will quit, unless somebody else wants to take it up. We have two contracts here offered in evidence. One is No. 9,

which is the contract of the Ohio Fuel Gas Company with the Dayton Power & Light Company. Is there another one?

Judge Matthews: Yes, sir, there are two of them.

Mr. Mullin: Nine and ten.

By Chairman Geiger:

Q. And ten is articles of agreement between the Dayton Power & Light Company and the Ohio Fuel Gas Company. Now each of these contracts calls for the payment to this company of 45 cents per thousand cubic feet. The first one recites the fact that the Dayton Company has acquired from the Ohio Company the gas distributing systems in and about the following communities in Ohio, and it names all of them in this investigation I believe except Wilberforce, doesn't it?

A. Except Washington Court House.

Q. Now when did the Dayton Company acquire from the Ohio Company the gas distributing systems in and about these communities?

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[fol. 758] A. July 1st, 1928.

Q. What did they pay for them?

A. I couldn't tell you offhand.

Q. Somebody knows, don't they?

A. It is a matter of record. It is a matter of record here in this Commission. I have the record in my office.

Q. When did they buy them?

A. July 1st, 1928.

Q. Now do you know when the Ohio Fuel Gas Company was connected with the Columbia Corporation?

A. No, I don't.

Q. Was it before or after that time?

A. I don't know.

Q. Do you know when the Columbia Gas & Electric Company became the owner of the common stock of these companies?

A. Which companies?

Q. They own your common stock?

A. They became the owner of the common stock of the Dayton Power & Light on April 1st, 1925.

Q. That is, the Columbia Gas & Electric Company owned your company April 1st——

A. The Columbia Corporation.

Q. Oh, the Columbia Corporation? That is, the Columbia Corporation, April 1st, 1925; is that right?

A. That is right.

Q. Columbia Corporation? They owned then all of your common stock?

A. Yes.

Q. Now what common stock, if any, did they own at that time of the Ohio Fuel Gas Company?

A. I know not.

Q. You do not know? When did the Columbia Corporation pass into the control of Columbia Gas & Electric Company?

A. I don't know.

Q. Is it in the control?

A. I think it is, but I am not certain.

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[fol. 759] Q. When did the Ohio Fuel Gas Company pass into the control of the Columbia Corporation or the Columbia Gas & Electric?

A. I know nothing about the Ohio Fuel Gas Company's history.

Q. It is controlled by one of those companies?

A. I think so.

Q. As far as your stock ownership goes——

A. I think we made that statement at the beginning of the proceeding.

Q. Prior to the date of this contract it seems—I don't know how long—the Ohio Fuel Gas Company owned these distribution plants?

A. Yes.

Q. How did they distribute their gas? At the gateway?

A. How did they distribute it?

Q. Yes.

A. They distributed it through the distributing systems in these various towns.

Q. They did not fix a charge at the gateway?

A. I don't know what they did.

Q. You were connected with the Dayton Gas Company at that time, weren't you?

A. With the Dayton Gas Company? No, the Dayton Gas Company became a part of the Dayton Power & Light Company July 1st, 1925.

Judge Matthews: We bought their property.

The Witness: We bought the physical property on that date, but the Dayton Gas Company had no relation to these eight towns involved in these proceedings. The Dayton Power & Light Company purchased the physical property of these towns, exclusive of Washington Court House, July 1st, 1928. They purchased the property of the Washington Court House Company January 1st, 1926.

Q. When the Ohio Fuel Gas Company owned the dis- 766
[fol. 760] tributing plants in these eight towns, with the exception of Washington Court House, what rate did they charge for gas, do you know?

A. I can answer that question by telling you what rates were in effect when we bought the properties.

Q. What rates were in effect?

A. It was a dollar for the first 500 cubic feet or less or none, and 50 cents for all over.

Q. Has there been a raise of rates?

A. Only that which is under this proceeding at the present time.

Q. There has never been any other rate or rates since the Ohio Fuel Gas Company owned these distributing gas companies to this time?

A. Your Honor that is not what I said.

Q. That is what I understood you to say?

A. No, that is not what I said.

Q. What did you say?

A. I said the Dayton Power & Light Company bought these properties July 1st, 1928.

Q. Yes.

A. And I told you the rates that were in effect when we bought them. What they were prior to that time, I don't know anything about it.

Q. You know since you bought the properties then there has been no raise of rates?

A. Correct, except that which is under these proceedings, and we are collecting that increased rate now.

Q. As soon as you bought the property, did they immediately begin to charge you 45 cents?

A. As soon as we bought the property we paid 45 cents for gas.

Q. You don't know who was originally the owners of the gas? Was it the Ohio Fuel Gas Company?

A. We buy our gas from the Ohio Fuel Gas Company.

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[fol. 761] Q. Who do they buy it from? Do they control the wells?

A. I don't know. I know nothing about it.

Mr. Mullin: Most of it comes from the State of West Virginia.

Q. Do they produce the gas?

A. I don't know.

Q. You don't know that?

A. No.

Q. You don't know what the gas costs them?

A. I do not.

Q. But you do know this in a general way, but not definitely, that all this group of companies are interrelated, and that if the Ohio Fuel Gas Company charges 45 cents a thousand cubic feet, then you have got to charge the consumer something above that to make money?

A. To answer your question direct—it is about a three way question—there is some interrelation undoubtedly throughout the Columbia Corporation or the Columbia Gas & Electric Corporation. What it costs to produce gas I know nothing about. I do know that we have to pay 45 cents for gas. And I do know this, that the directors and officers of the Dayton Power & Light Company have attempted to do what is the best thing in purchasing gas to be distributed to these towns. If we could buy gas elsewhere for a less price we would do it and gladly do it.

Q. Have you a contract now?

A. It is in evidence as an Exhibit, known as Exhibit No. 9.

Q. But they have expired?

A. No, Exhibit No. 10 is the contract that has expired.

Q. Exhibit No. 9 says this: "This agreement shall be effective as of midnight of August 1st, 1928, to continue in force until midnight of the following October 31st, 1929, and thereafter subject to cancellation and complete termi-

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[fol. 762] nation by either party upon not less than 60 days' written notice." That is, it is in force and effect, because neither party has sought to cancel it.

A. That is a legal question that I will leave to You Honor or the Legal Department to discuss.

Q. This is the contract under which you take the gas?

A. This Exhibit known as Exhibit No. 9 is the contrac under which we take the gas for all of the cities in thes proceedings except Washington Court House.

Q. Washington Court House is under No. 10?

A. Washington Court House is under No. 10. That co tract has expired, but we are still operating under tha contract.

Q. That contract expired on the 31st of December, 192

A. Yes, it is noted in the fourth paragraph.

Q. Now with all these facilities you have through th Columbia Engineering & Management Corporation, di you ever submit to them the question as to whether or n 45 cents was a fair rate to pay for gas, and have the analyze it?

A. When these contracts were negotiated with the Ohi Fuel Gas Company, as I said before, the directors an officers of our company have done everything possible t get a lower rate for gas.

Q. What did you do?

A. They submitted a contract to us which we did n like, which we turned down, because we did not like it an would not pass it. This is the final contract, after con siderable negotiation, for the purchase of gas.

By Commissioner Bricker:

Q. Have you the original of that?

A. Yes.

Q. May I see it?

A. Yes.

By Chairman Geiger:

Q. You bought their property for a certain sum of cas

[fol. 763] or stock?

A. We paid that in cash.

Q. You don't know how much you paid them?

A. No, I wouldn't want to say. It is in your proceed ings.

Q. Was it part of that same agreement that you pay 4 cents?

A. There was no agreement entered into when we bought the property as to what we would pay for the gas.

Q. Do you mean to tell me, as skilled as you are, as skilled as you are, that you were so short sighted as to pay cash for a distributing plant which could only be supplied by one distributor or one transportation company, without knowing how much you are going to pay for that gas?

A. That naturally would come up in the negotiations. You asked me about an agreement. There was no agreement. Naturally we investigated as to what we would have to pay. We were already paying 45 cents in Washington to these people. Would we expect to buy gas for less in these eight towns?

Q. How long have you been paying that?

A. Since January, 1927.

Q. You still made no agreement with them as to what you were to pay them for the gas?

A. We made no agreement with them as to what we are to pay for the gas when we bought the properties but I do know that we entered into negotiations——

Q. You know this, that if they had it entirely in their power to fix the gas rate, that they would compel you to go to the consumer and put up the price in order to get enough to pay them their 45 cents?

A. They never said any such thing at all.

Q. You knew that if you had any foresight at all?

A. We didn't say we would have to go before the con-

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[fol. 764] sumers to ask for an increase in rate.

By Mr. Rush:

Q. This Exhibit No. 9 contract, I note clause No. 8 states that this agreement is executed in triplicate. Who got the other copy of the agreement?

A. I assume we have two copies of it or maybe the Ohio Fuel has two copies.

Q. It is only in triplicate?

A. I said "or".

Judge Matthews: Did you file a copy up here?

A. No, I don't think so.

Q. Do you know whether the other copy is?
A. I do not.

And thereupon the further hearing of this matter was adjourned to 9:30 o'clock Wednesday Morning, June 4th, 1930.

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[fol. 765] Wednesday Morning Session, June 4th, 1930.

And also—

O. E. Howland, resuming the stand for further cross-examination, continued his testimony as follows:

Cross-examined by Mr. Rush:

Q. You are Mr. O. E. Howland, who was testifying at the close of the session yesterday afternoon?
A. Yes.
Q. I want to get some dates in mind before we continue cross-examination. You bought, as I understood you to say yesterday afternoon, the physical properties found in these eight towns other than Washington C. H., on July 1st, 1928, from the Ohio Fuel Gas Company?
A. That is correct.
Q. And you paid cash for that physical property?
A. We did.
Q. You said that the common stock of the Dayton Power & Light Company is owned by the Columbia Corporation; that is correct?
A. That is correct.
Q. And that Columbia Corporation is a different corporation from the Columbia Gas & Electric Corporation. Is that the name of the other corporation?
A. There is a company known as the Columbia Gas & Electric Corporation. I assume that is the one to which you refer. But I have no knowledge of their corporate set-up or their financial matters whatsoever.
Q. The stipulation heretofore made by counsel that the common stock of the Dayton Power & Light Company was

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[fol. 766] owned by the Columbia Gas & Electric Company is in error?

Judge Matthews: Well yes, it is in error——

Q. Just let the witness answer.

A. If that is the statement counsel made; the common stock of the Dayton Power & Light Company is owned by the Columbia Corporation.

Q. And that stipulation is in error?

A. I say the common stock of the Dayton Power & Light Company is owned by the Columbia Corporation.

Q. Will you just answer that yes or no? That stipulation is in error?

Mr. Mullin: The witness has answered it.

Chairman Geiger: He does not know what the stipulation is.

Mr. Bricker: He cannot pass on the stipulation in that manner.

Q. Now right there, who owns the stock of that corporation?

A. What company owns the stock of the Columbia Corporation?

Q. Yes.

A. I don't know, Your Honor, but I think it is the Columbia Gas & Electric Corporation.

Q. Are they the ultimate holding company, the Columbia Gas & Electric Company?

A. I think so. I can't state positive.

Q. Through a series of other corporations?

Mr. Mullin: The witness did not say that, Judge Geiger.

Chairman Geiger: I am asking that. All right. Withdraw my last question.

Q. When did the Columbia Corporation gain control of of the Dayton Power & Light Company?

A. The Columbia bought the common stock of the Dayton Power & Light Company April 1st, 1925.

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[fol. 767] Q. You stated it bought the common stock. From whom did it buy it?

A. The stockholders.

A. That was April 1st, 1925?

A. Yes, sir.

Q. And what time was this contract which we referred to yesterday, or which you referred to, entered into between the Dayton Power & Light Company and the Columbia Engineering & Management Company?

A. Please, Mr. Rush, there are two contracts one Exhibit 9 and one Exhibit 10. To which one do you refer?

Q. I am not referring to either one of those exhibits. I am referring to the contract which you mentioned in your testimony yesterday afternoon as having been entered into between the Dayton Power & Light Company and the Columbia Engineering & Management Corporation?

A. Let me refresh my memory just a minute.

Chairman Geiger: That is the one where you agreed to pay them the two per cent for services?

The Witness: Yes. In December, 1925?

Q. Do you know the date?

Chairman Geiger: Have you got a copy of that contract here?

The Witness: Yes.

Chairman Geiger: Could you put it in evidence? Let us look at it please. Just let us look — it and see what it is.

Judge Matthews: There is a copy of it, Your Honor.

The Witness: Your Honor asked to look at this copy.

Chairman Geiger: All right, gentlemen, proceed.

Q. I believe you testified yesterday afternoon that the Columbia Engineering & Management Company you assumed was controlled by the Columbia Gas & Electric?

A. I think it is.

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[fol. 768] Q. Do you know or will you state whether or not the Ohio Fuel Gas Company has a contract possibly similar to yours with the Columbia Engineering & Management Corporation?

A. I stated yesterday, and I still state this morning, that I know nothing about the operation or the management of the Ohio Fuel Gas Company.

Q. Do you know the treasurer of the Ohio Fuel Gas Company?

A. Yes, sir.

Q. You have testified on yesterday that the Columbia Engineering & Management Company had the treasurers of affiliated companies appear at their office every so often to talk over intercompany business. Have you seen at such a meeting the treasurer of the Ohio Fuel Gas Company?

A. I have.

Q. So you would assume then that the Ohio Fuel Gas Company holds a contract similar to yours with the Columbia Engineering & Management Corporation?

Judge Matthews: I object.

Commissioner Bricker: It is cross-examination. If he doesn't know, he can testify.

Mr. Mullin: The question is whether he can assume that. If they want to ask him what he knows, I do not think it would be objectionable, but he ought not to be asked what he assumes.

Mr. Rush: He knows that they attend the meetings. I believe he has testified to that before.

Judge Matthews: You can draw your own assumptions.

Commissioner Bricker: That is in the record.

Q. Are any of the Ohio Fuel Gas Company's officers present?

A. I don't see any—yes.

Q. Will you name him please?

A. Mr. L. A. Seyffert.

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[fol. 769] Q. How do you spell that last name?

A. Seyffert.

Q. I believe that the directors of the Dayton Power & Light Company have been submitted in evidence, but in order to have them clearly in mind to discuss these following questions or to answer the following questions, I will ask you whether or not this is your Board of Directors——

A. I will read it to you and get it to you correctly if you like it.

Q. I have a copy here. It doesn't matter which way. Go ahead and read it. A. F. M. Tait, O. H. Hutchings, O. E. Howland, E. P. Matthews, George Light, J. C. Matthieu, John Breen, H. C. Blackwell, C. W. DeForest, E. Reynolds, Jr., P. G. Gossler.

Q. There are eleven directors in all?

A. Yes.

Q. Mr. Tait is president. Mr. O. H. Hutchings is Vice President and General Manager. I am secretary-treasurer. E. P. Matthews is vice president. J. C. Matthieu is vice president.

Q. All of those officers that you have just named are paid by the Columbia Engineering & Management Company?

A. They are not, not all of them.

Q. Which ones of those officers are paid?

A. F. M. Tait, O. H. Hutchings, O. E. Howland.

Q. Are any of the other members of your Board of Directors paid by the Columbia Engineering & Management Company?

A. They are not.

Q. When was this present Board of Directors elected?

A. At the last meeting of stockholders on April 24th, 1930, but it is the same directorate except one, which has been on the Board for a number of years. The only exception is Mr. J. C. Matthieu, who was elected to the Board on April 24th, 1930.

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[fol. 770] Q. Who elected this present Board?

A. The stockholders.

Q. And the stockholders on April 24th, 1930, were, or possibly we should say was, the Columbia Corporation?

A. Correct.

Q. So the Columbia Corporation appointed or elected your Board of Directors?

A. The stockholders elected the Board of Directors.

Q. There are no other stockholders except the Columbia?

A. Yes, sir, there are about——

Q. I mean voting stockholders?

A. Yes, sir, there are about 3,400 stockholders. The common stockholders have the right of voting or the voting rights for the election of directors. There are certain restrictions on the voting power of the preferred stock.

Q. But for the purpose of electing the Board of Directors, the common stock held by the Columbia Corporation is the only stock which may be voted?

A. On certain conditions.

Q. On certain conditions? They were the only stock that was voted on April 24th, 1930?

A. Correct.

Q. Now this contract with the Ohio Fuel Gas Company, known as Exhibit 9, was entered into in August, 1928?

A. August 1st, 1928.

Q. At that time the Columbia Corporation owned the common stock which was voted for directors on April 24th, 1930?

A. They did.

Q. April 24th, 1930?

A. Correct.

Q. Now, what negotiations, if any, were had by your Board of Directors leading up to this contract, known as Exhibit 9?

A. The officers of the company are empowered to nego- 777

[fol. 771] tiate contracts by the directors. The officers of the company in negotiating a contract of this kind made inquiry and studied the situation as they would in entering into any other contract of similar nature.

Q. You say the officers are——

A. Pardon me please.

Mr. Mullin: Let him finish his answer.

Chairman Geiger: Let him finish. Go ahead, Mr. Howland.

A. We, as officers of this company, exercise the duties conferred upon us in a conscientious manner. We are not puppets of a large corporation. We have been on this property, all of the officers, we have been on the property of the Dayton Power & Light Company for many years, and place up as high as 35 or 40 years, some of the officers. Naturally in negotiating contracts we would endeavor to get the very best possible price we could get for gas. We would try to get the most reliable source, because we know that the service we render to our customers depends upon the supply of gas which we can purchase. In that instance I might say that there were one or two contracts, possibly only one, submitted before this contract was entered into. Some matters in the other contract we did not like, and we did not accept it. And this is a result of our research and negotiations for purchase of gas, which gas is purchased under this contract at 45 cents per thousand cubic feet at the gate.

Judge Matthews: Did you do all these things?

The Witness: We certainly did.

Mr. Mullin: The witness has testified what they would do, and the Judge asked him if they did do it in this instant case.

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[fol. 772] Q. My question was, what negotiations, if any, did the Board of Directors enter into or have leading up to this contract? I was not asking yet about the officers.

A. I think I answered you in the first place.

Chairman Geiger: Have you got your minute books?

Mr. Rush: That is what we want, if Your Honor please. He said that the Board of Directors empowered the officers to enter into a contract.

Chairman Geiger: The minutes will show.

Mr. Rush: I would like to see, when they had a meeting, what was spread on the record.

Chairman Geiger: Do you ask that the minutes be produced?

Mr. Rush: I do.

Chairman Geiger: All right, can you produce the minutes?

The Witness: I can produce them. They are not here. But Your Honor I can say this. Under our corporate structure and our by-laws and so forth, the officers of the company are empowered to negotiate such contracts. This contract here was ratified by the Board of Directors on September 25, 1928.

Mr. Mullin: Which contract do you mean?

The Witness: The contract known as Exhibit 9.

By Chairman Geiger:

Q. October what, 19 when?

A. September 25th, 1928.

Q. September 25th, 1925?

A. '8.

Q. 1928, yes.

(No reply.)

Mr. Rush: It is of vital importance to the cities to know whether those officers, who are paid by the Columbia Engineering and Management Corporation, were empowered

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[fol. 773] to enter into a contract after the common stock was purchased by the Columbia Corporation. I don't know just how to proceed if the witness does not have his minute book here to refresh his memory, and a lot of our questions will be based upon the answer which will be given to

the question we are about to ask, which is when the officers were so empowered.

Judge Matthews: The witness has testified not uncertainly at all, but certainly that this contract was ratified by the Board in September, 1925.

The Witness: '8.

Judge Matthews: Or 1928.

Mr. Rush: That is not our question. Our question is when were the officers empowered by the Board to enter into a contract?

The Witness: Yes, sir, Mr. Rush, that has always been a part of our regulations and by-laws ever since the existence of the Dayton Power & Light Company, that the officers were empowered to negotiate contracts.

Judge Matthews: And submit them to the Board.

Q. So that this contract was negotiated by the officers of your corporation?

A. Yes, sir.

Q. And these officers are paid by the Columbia Engineering & Management Corporation?

Judge Matthews: Don't keep repeating that. That is in the record. What is the use of putting that in the record and asking more questions.

Mr. Rush: Let us not interrupt in the cross examination.

Chairman Geiger: One at a time. You object?

Judge Matthews: I object to keeping repeating, repeat-

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[fol. 774] ing, repeating all this that is in the record.

Chairman Geiger: All right. It may stay in at this time. Don't put it in again.

Judge Matthews: If you were trying this before a jury, you might keep doing that. But this is no jury.

Chairman Geiger: What are we?

Q. Now, did your officers negotiate with any other supply company, that is, a fuel gas supply company, other than the Ohio Fuel Gas Company?

A. There is no other company to negotiate with, because the service was not available to be purchased from any other source.

Q. Then you mean that the Ohio Fuel Gas Company really has a monopoly in this particular territory?

A. That is your interpretation.

Q. In other words, there are no supplying gas lines in that vicinity?

A. There are not.

Q. There were no other supply companies with which you could negotiate?

A. There were not.

Q. On September 25, 1928, when this contract was ratified by your Board of Directors——

Chairman Geiger: December when?

Mr. Rush: September 25, 1928.

Chairman Geiger: I thought you said December and that was Christmas day.

Q. How many of your directors voted for ratification?

A. All; all that were present.

Q. Were all of the directors present?

A. I couldn't tell you.

Q. How many were present?

A. I couldn't tell you.

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[fol. 775] Chairman Geiger: He couldn't tell that. The minute books can be brought here. Do you want the minute books?

Mr. Rush: I do. I have asked for them.

Chairman Geiger: Will you produce them?

The Witness: We can produce them.

Judge Matthews: It will take time to do it.

Chairman Geiger: All right. Issue a subpœna duces tecum. If you won't produce them we will make you produce them.

The Witness: Sure we will produce them. We are glad to do it.

Judge Matthews: We can't do it right now. They are not here.

Chairman Geiger: Certainly not. Don't quibble about whether they will be produced. They are the best evidence of what counsel wants to prove.

Mr. Mullin: Do counsel want the minute books or do they want a copy of the portion of the minutes pertaining to this question, which would be certified to by the witness under his oath?

Mr. Rush: As I understand it, if the Commission please, what in the opinion of counsel for the Dayton Power &

Light Company would be pertinent, may be very much at odds with which counsel for the city thinks is pertinent.

Mr. Mullin: That might be possible. But let's see what you think is pertinent.

Chairman Geiger: We assume that the Public Service Corporation is not afraid to submit its minutes to inspection, and instead of selecting out here, there and other where, produce the minute books. In fact the Commission

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[fol. 776] wants to look at them anyway.

Mr. Mullin: So far as it involves anything pertinent to this proceeding, the company has no objection whatever to submitting its minute books. It does not want to submit its minute books for any fishing-expeditions by counsel or anyone else.

Mr. Rush: We strenuously object to counsel for the Dayton Power & Light Company taking the position that they shall be the sole judge of what is pertinent or what is not pertinent.

Chairman Geiger: They can take any position they want to. You can't object to their taking a position.

Mr. Mullin: It will be necessary for us to have a further hearing, at which the minute book can be produced and the pertinent portions of it introduced. We have no objection to doing that.

Judge Matthews: Certainly that cannot be done today.

Mr. Rush: That is all right.

Chairman Geiger: That is all right. If they are going to produce the minutes there is no use asking him what is in them.

Q. I will ask you whether or not any of the members of your Board of Directors are also members of the Board of Directors of the Columbia Corporation, or whether they are part of the personnel or officers of that corporation?

A. I don't know anything about their corporate structure or corporate set-up whatsoever.

Q. Do you know whether or not any of the members of the Board of Directors of the Dayton Power & Light Company are members of the Board or are officers or part of

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[fol. 777] the personnel of the Columbia Gas & Electric Corporation?

A. I know nothing about the Columbia Gas & Electric Corporation. I have told you that a number of times.

Q. Do you know whether or not any of your Board of Directors, that is, the Board of Directors of the Dayton Power & Light Company, are on the Board of Directors or are officers or part of the personnel of the Columbia Engineering & Management Company?

A. I don't know anything about the Columbia Engineering & Management Corporation set-up.

Q. Do you know whether their directors—can you answer that question?

A. Read his question.

(Previous question read as follows: "Do you know whether or not any of your Board of Directors, that is, the Board of Directors of the Dayton Power & Light Company, are on the Board of Directors or are officers or part of the personnel of the Columbia Engineering & Management Company?")

A. I know nothing about the Columbia Engineering & Management Corporation, only as I come in contact with it; as to their Board of Directors, I don't know anything about their Board of Directors.

Mr. Mullin: Then you answer his question no?

The Witness: The answer is no.

Q. Do you know from whom the Ohio Fuel Gas Company purchases its gas?

A. I do not.

Q. I believe you testified yesterday afternoon that the Ohio Fuel Gas Company does not produce gas.

A. I did not testify to that.

Q. Do you know whether it does produce gas?

Mr. Mullin: He testified that the Dayton Company does not.

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[fol. 778] Mr. Rush: I will put the question in another way.

Q. Does the Ohio Fuel Gas Company produce the gas which it sells to you?

A. I don't know.

Q. Are any of the officers of the Columbia Gas & Electric Corporation present?

A. I don't know anything about the Columbia Gas & Electric Company officers.

Q. Are any of the personnel of the Columbia Gas & Electric Company present?

A. I don't know. I don't know anything about their corporate set-up.

Q. I am not asking you whether you know anything about their corporate set-up. You have been around here associating with these men. You know whether they belong to the Columbia Gas & Electric Corporation or are connected with this set-up?

A. Pardon me. I don't know whether these gentlemen that are here are part of the Columbia Gas & Electric Corporation. I told you yesterday some that were working for the Columbia Engineering & Management Corporation.

Chairman Geiger: Anything further, gentlemen?

Mr. Rush: I believe that is all, if the Commission please.

Redirect examination.

By Judge Matthews:

Q. Mr. Howland, did you make an investigation as to wholesale gas rates for natural gas delivered wholesale at certain cities?

A. I have.

Q. Have you got that?

A. I have.

Q. Will you produce it?

A. Yes.

Q. How did you make this investigation? Did you do it

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[fol. 779] yourself?

A. By search and inquiry through the files of the Commission and contact with the—by looking over various manuals from the Gas Association and various periodicals which we have that disclose this information.

Q. Have you got this in shape to be introduced as an exhibit?

A. Well, here is it.

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[fol. 780] Q. At the time this contract known as Exhibit 9, and just before that time, was entered into, I would like to know whether the officers of the Dayton Power & Light Company corresponded or consulted with the personnel, officers or directors of the Columbia Corporation?

A. Well, I cannot answer your question on that. I know that we had contact with the officers of the Ohio Fuel Gas Company, with which the contract was made, but as to the contact with officers of the Columbia Gas & Electric Corporation, I don't know.

Mr. Pfarrer: The question was the Columbia Corporation.

Q. The officers, personnel or directors of the Columbia Corporation?

A. Not to my knowledge. I don't know the directors of the Columbia Corporation.

Q. Do you know the personnel?

A. No.

Q. Did you have any correspondence or consultation at all with the Columbia Corporation?

A. Not to my knowledge.

Q. Would you have known it if you had had such correspondence?

A. I would.

Q. Or consultation? Did you corespond as an officer or director or did any of the officers or directors correspond or consult, with the Columbia Engineering & Management Company prior to the time that you entered into this contract?

A. We did, because under our arrangement for operating this property we naturally would be obligated to; we would be supposed to; and we would.

Q. Did this latter corporation advise you to enter into this contract?

A. They did not.

Q. They gave you no statements as to the advisability of entering into this contract?

A. They accepted our recommendation. We recom-

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[fol. 781] mended that we adopt and enter into this contract.

Q. Then instead of their recommending to you, you recommended to them?

A. We did.

Q. So that they had the final O. K. of the whole matter?

A. I would not say that they did.

Q. But you at least recommended it to them?

(No reply.)

Cross-examination.

By Mr. Klapp.

Q. At this time of entering into the contract, did the Dayton Power & Light Company investigate the feasibility of a contract with another company who might construct a gas line into this territory?

A. There is no such company available.

Q. No company who would do that?

A. None to my knowledge.

Q. Did they attempt to find out whether there was such a company?

A. There are some things you know Mr. Klapp. I will tell you this, if you will get up a company and get gas to Dayton or these towns that will sell gas for less than that, we will buy it of you.

Q. I don't believe we could find the gas fields now. I think you own them all. This contract, Mr. Howland, in the negotiations for this contract, they were terminated very conclusively by this fact, that there was only one company with whom you could make this contract for gas; is that not true?

A. It is the only available source of supply.

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[fol. 782] Q. At the time of the negotiation of this contract, you were one of the officers, of course?

A. Yes, sir.

Q. And as one of the officers I will ask you whether or not it appeared to you that you were in the position of taking what was handed to you rather than making a contract dictated by your own judgment?

A. I would not admit your question, because I have the reputation of being a hard grabber for a bargain.

Q. Do you think you were in position to bargain at the time this contract was made?

A. I think we were.

Q. I would like for you to explain that. I would like to see how. I want to know how this is done.

A. You as an attorney have undoubtedly had experience in entering into contracts, haven't you?

Q. Yes, a few.

A. And you drive the best bargain you can, don't you?

Q. Yes, if I am answering questions.

A. I am answering your questions interrogatively.

Q. Proceed.

A. You drive the best bargain you can, don't you? That is exactly what we have done under these circumstances. I told you in the beginning yesterday and also told you this morning that in negotiations for this contract, the contracts that were submitted had things in them that we did not like, and we would not accept them. Isn't that sufficient evidence that we didn't just take something that was handed to us?

Q. I would like to know about that, what they were and how you escaped accepting the contract submitted to you.

A. I cannot recall what the objections were to the first

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[fol. 783] drafts of the contract. You seem to have the opinion that we, as officers of the Dayton Power & Light Company, just take what is handed us and say, "All right." That is not the situation. I told you this morning also that the officers of this company had been officers of this Dayton Power & Light Company for many years, and they are in the habit of doing business in a conscientious and upright manner.

Judge Matthews: Who controls their actions?

The Witness: The Board of Directors.

Judge Matthews: Who controls the Board?

The Witness: The stockholders.

Judge Matthews: Does anybody dictate the action of the Board?

The Witness: They do not.

Q. I do not believe, Mr. Howland, that I had anything like an answer to the question that I asked, what method you could take at the time of the bargaining over this con-

tract that would help you be effective to reduce the rate which might be offered you by the Ohio Fuel Gas Campany, inasmuch as you have testified that they were the only people that you could buy from.

A. I think my answer is pretty well made on that.

By Commissioner Bricker:

Q. If the Ohio Fuel Gas Company had asked you 55 cents for gas at the gate, what would you have done?

A. We certainly would have bartered with that Board very strong.

Q. How would you have gone about it?

A. In the first place we would have told them that we thought we ought not to pay that much.

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[fol. 784] Q. What if they would not have supplied it for anything less; what would you then have done?

A. I assure you there would have been plenty of negotiations for a price of 55 cents.

Q. You have not answered my question. Eventually you would have accepted it?

A. Eventually we might have accepted it. There was no place to get a supply.

Q. That means then that eventually the Ohio Fuel Gas fixes the price of gas at your gateway?

A. I suppose you would consider it that way. Anybody that has something to sell fixes the price for which it will sell—any commodity.

Q. The only difference in this situation, you are compelled to buy it?

A. That is the only available supply.

Judge Matthews: For natural gas?

The Witness: Yes.

Judge Matthews: If you could not get the proper price, what about some other gas?

The Witness: If we could not get natural gas at a proper price, we would build a gas plant.

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[fol. 785] Q. On page 10 of the exhibit you were just referring to where you have listed taxes, excise and others, $9,464.00?

A. Yes.

Q. To what do the others refer?

A. That refers to the maintenance of the Public Utilities Commission, taxes paid for the maintenance of the Public Utilities Commission, which is about .04 per cent., or about 1/20 of one per cent. of your gross earnings. The other tax there under which it says excise and others is the State excise tax, which is 1.53 per cent. of your gross earnings. You figure that out and take your gross of $679,444.00, and multiply by those percentages and you will get that amount.

Q. Does either one of the items of taxes found on page 10 represent any taxes paid to Federal Government on income?

A. Not on page 10 they don't.

Q. Do you have in the exhibit where you have paid income taxes?

A. On page 16, next to the last column, under the caption "estimated revenue and expenses under proposed rate," you will find there $2058.00 for Federal taxes. That is 12 per cent. on the net income before depreciation—no, that is

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[fol. 786] 12 per cent. on your net income before Federal taxes, the figures of which would be, reading from that page, taking the $15,091.00 shown as net income, adding to that $2,058.00, your Federal tax, would give you $17,149.00, on which your Federal tax would be based. Twelve per cent. of that is $2,058.00.

Q. Did the Dayton Power & Light Company pay any Federal income tax for the year 1929?

A. The Dayton Power & Light Company, yes.

Q. For what reason do you not show a percentage of that income tax under the heading of operating expense for the eight cities involved?

A. Because the gas division of the Dayton Power & Light Company had no net income on which to base a Federal tax. The gas division of the Dayton Power & Light Company is shown in the red for the year ending December 31st, 1929. Naturally there would be no Federal tax under that condition.

Q. The income tax, however, you did not separate as between the two divisions of your income?

A. Income tax?

Q. Yes, for purposes of income tax.

A. Certainly.

Q. The company paid a tax as a company?

A. The company paid a tax as a company, but no part of that income tax paid by the company is included in this exhibit except as I have testified now.

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[fol. 787] Q. Mr. Howland, did you examine the minutes of the company, the minutes of the directors, to find about the action of the Board on the gas contract, on the contract for the wholesale purchase of gas for Washington Court House and some other town in that neighborhood?

A. Yes.

Q. Did you find it?

A. No, there isn't any record of that contract being approved by the Board.

Q. Do you know who that contract was signed by?

A. Yes, we have a copy of it here as an exhibit.

Q. Who is the contract signed by?

A. The contract referred to is Exhibit 10, and is signed on behalf of the Ohio Fuel Gas Company by Raymond Cross, President, and on behalf of the Dayton Power & Light Company by O. H. Hutchings, Vice President, and O. E. Howland, Secretary.

By Commissioner Bricker:

Q. You signed that as secretary, Mr. Howland?

A. Yes, sir.

Q. Do you remember by what authority you signed it?

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[fol. 788] Who authorized you to sign it?

A. Yes, the contracts of the corporation are usually signed by the President or Vice President, Secretary and Assistant Secretary.

Q. Who authorized this signature?

A. That is the procedure of our company. Those officers would exercise their duties as officers and sign contracts of that nature.

Q. Was there any special authorization given in connection with the other contracts?

A. I beg your pardon?

Q. There was special authorization given for your action in the other contracts?

A. No, Your Honor, it was not specially authorized. The Board of Directors approved the other contract.

Q. There was no approval made of this contract at all then?

A. I don't find that there was.

Judge Matthews: That is Washington Court House, you mean?

Commissioner Bricker: Yes.

Q. Can you explain why that was not approved by the Board?

A. Possibly an oversight on my part.

Q. Now my attention has been called here to one authorization or ratification or whatever you may call it in this wording: "Resolved that the officers of this company hereby are authorized and directed to execute on behalf of the company the contract for the purchase of natural gas from the Ohio Fuel Gas Company in substantially the form submitted to this meeting, said contract to cover a period from August 1, 1928, to October 31, 1929." Now that action was taken in anticipation of the signing of the contract, was it not?

A. It possibly was.

Q. Are these minutes written up in anticipation of the directors' meetings?

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[fol. 789] Judge Matthews: No, sir.

Commissioner Bricker: No?

The Witness: Those minutes are never written until after the meetings have been held.

By Commissioner Bricker:

Q. You said it was your oversight then that there was no ratification of the Washington Court House contract? Didn't your Board of Directors know that that had been done?

A. The only thing I can say on that is, it is an oversight on my part. I know that the Board of Directors knew about it, and I know that the officers knew about it, and it is just an oversight on my part that it was not brought up before the Board for formal action.

Q. These contracts were generally handed to you and then you presented them to the Board at its meeting?

A. Probably, or either our President or Vice President might bring it to the meeting. But you see either one of us might have had the contract in our hands.

Q. Was there any change ever made in any of the contracts as they were submitted to your Board?

A. Well, I couldn't answer that question definitely, whether there was or not, but I can say this in answer to your question, that these contracts, this particular contract I know was discussed very freely with the Board. Now, there were some changes made as I testified here before. The first or second draft of the contract as submitted was not satisfactory to us and there were changes made in either the first or second draft.

Q. Who made those changes then?

A. Those changes would be made through the officers of the company.

Judge Matthews: That was up before this Board, wasn't it?

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[fol. 790] The Witness: I rather think it was. In other words, in submitting a contract of that kind to the Board, the procedure is usually very well ironed out before it is presented to the Board, and I think you will find that that is natural in any corporate structure.

Q. Did you prepare these minutes yourself?

A. I prepare them with the assistance of counsel.

Q. Do you remember what any of the specific changes that the officers of this company, including yourself, made in any of the contracts which were submitted to you were?

A. No, I do not. I think I mentioned that before, too, that I did not remember what any changes were that came up in the negotiation of this contract.

Q. You don't know then whether or not those changes were made subsequent to this authorization or prior to the authorization?

A. I could not say definitely, but I think they were made before.

Q. Then, so far as you know, this paragraph or phrase, "in substantially the form submitted to this meeting," meant nothing more than the authorization to sign the particular contract which was submitted then?

A. I assume that that was tentatively adopted.

Q. At this time the Ohio Fuel Gas Company was a public utility, was it not?

A. Your Honor, I would not know what classification they come under from the standpoint—from a legal standpoint. I can say this, that they were selling gas. Whether they are classified as a public utility, I do not know. I probably assume that they are.

Judge Matthews: Wait a minute. You can't assume any-

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[fol. 791] thing. You don't know, do you? That is a legal question. I don't think Mr. Howland should be asked to pass on it.

Commissioner Bricker: If he does not know, he is intelligent enough to say that he does not.

By Judge Matthews:

Q. Mr. Howland, since we met here at the last hearing of this case have you been making inquiry and been told who the officers of the Ohio Fuel Gas Company are?

A. Yes.

Q. How did you get your information?

A. I got it from Mr. L. A. Seyffert, the treasurer of the Ohio Fuel Gas Company. That information has been given to counsel representing the cities here.

Q. Will you tell what Mr. Seyffert told you with reference to the personnel of the officers of the Ohio Fuel Gas Company?

A. Let me refer to the record here just a minute. Shall I read them as they were given to me?

Q. Yes.

A. F. W. Crawford, Chairman of the Board; Raymond Cross, President; C. I. Weaver, Vice President and General Manager, J. M. Gerard, Vice President, T. B. Gregory, Vice President, T. H. Kerr, Vice President, K. C. Krick, Vice President, P. A. Alberty, Secretary, L. A. Seyffert, Treasurer, W. L. McCloy, John G. Pugh, George W. Crawford, P. G. Gossler.

Q. What are those last names you read? What are they?

A. They are directors. This which I read was the directors and officers as they were given to me by Mr. Seyffert.

Q. That is all you know about it?

A. That is all I know.

Q. Have any of those gentlemen any connection at all with the Dayton Power & Light Company?

A. Yes, one.

Q. Which one?
A. Mr. P. G. Gossler is also director of the Dayton Power
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[fol. 792] & Light Company.

By Chairman Geiger:

Q. What relation does the Ohio Fuel Gas Company have with the Logan Gas Company?
A. I don't know, Your Honor.
Q. Who did you name as the secretary there?
A. Of which?
Q. Of the Ohio Fuel Gas Company?
A. P. A. Alberty.
Q. You gave the name of C. I. Weaver there?
A. Vice President and General Manager.
Q. Is he not also Vice President and General Manager of the Logan Gas Company?
A. I don't know as to that.
Q. You don't know what relation there is between the Logan Gas Company and the Ohio Fuel Gas Company?
A. No, I know nothing about it at all.

By Judge Matthews:

Q. Mr. Howland, have you made up an exhibit of wholesale rates of gas, otherwise known as the city gate rates, that are charged in different cities throughout Ohio?
A. Yes.
Q. Will you let me have it?
A. Yes.
Q. Mr. Howland, what is this that you have before you?
A. This is an exhibit showing the price which other towns—which is paid for gas at the city gates for other towns in Ohio.
Q. You testified heretofore that you got this from an investigation that you had made from reports which were on file here with the Utilities Commission and from correspondence with these different towns; is that right?
A. Yes, sir.
Q. And from what else?
A. And from other sources of information which we have in our office pertaining to such matters.
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[fol. 793] Mr. Enyeart: Is that all of the towns in Ohio?

Judge Matthews: No, sir, not all of them.

Mr. Enyeart: We object to that.

Judge Matthews: Just wait a minute until I offer something for you to object to. Now may it please Your Honor we want to offer this in evidence, this Exhibit, as evidence tending to show the market price, wholesale market price, of natural gas in the State of Ohio. We discussed that once heretofore, but I wish to offer this exhibit at this time. Let me give a little bit of my theory about this thing. The last time I sat as a judge was when W. S. McConnaughey and I sat as referees in the American Finance case, without the intervention of a jury, and there were objections made at various times to evidence which was proposed. And we said to these gentlemen, "we cannot tell whether this evidence is material or whether it has any weight or is competent until we know what it is. It might as well be introduced in evidence; let it get in the record here, and then we will consider it when the time comes. And we think we are lawyers enough to know whether there ought to be any weight given to it. And we will give it what it is entitled to." That is what I think about this. If it has any weight you ought to let it come in and give it such weight as you think it ought to have. If it doesn't have any, that is all there is to it.

Mr. Mullin: This is the exhibit referred to at page 788 of the record of the prior hearing, and in connection with the testimony offered at pages 785 to 790.

Judge Matthews: Now Your Honors ought to have this evidence before you. If it is not competent, if it hasn't

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[fol. 794] any weight, why, of course, you won't give any weight to it. But you ought to know what it is.

Mr. Klapp: If the Commission please, in regard to this exhibit, we want the Commission to have every form of evidence and every form of assistance it can have with regard to the price of natural gas in Ohio. We would like to have it for our own use. We think if such a thing is to be introduced, however it should show every price paid for gas in the State of Ohio, and we don't care to have anything submitted here which has certain prices deleted. I am not saying that that is the case, but they have said they have not shown all of the cities in Ohio. Now, if they have

submitted a certain list, we would like to submit a certain other list of prices, which would tend to prove the opposite. We want it. I think counsel will agree with me. We won't object to a list showing everything that is paid for gas in Ohio, making it a complete list. Then you really would have something that would be of benefit in the examination of this case. But a partial list, compiled by either side, we submit, would likely be colored. We do not say that this one is, but we don't care to take any assumptions with regard to it.

Mr. Mullin: When this question was before the Commission and when the Commission ruled on it before, Judge Matthews stated that we would prepare this character of exhibit and submit it. The Commission ruled on the offer of evidence, of which this is a part. At page 788 Judge Matthews said, "No, we will have our exhibit prepared and bring it here and have it offered in that way. That is the best thing to show what the witness would testify if he were permitted to answer the question". It is in that con-
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[fol. 795] nection that this is introduced as I understand it.

By Commissioner Klinger:

Q. Why where these particular towns selected rather than some others?

A. Are you asking that question of me, Mr. Commissioner?

Commissioner Klinger: Yes, sir.

A. That is just the list I prepared and the investigations I made.

Q. Why did you select these? Are these the highest priced ones?

A. No, those are not the highest ones. There are some lower ones there, too.

Q. I know, but you have all the highest priced ones in here, haven't you?

A. That is the summary of my investigation along that line.

By Chairman Geiger:

Q. Would you be willing to answer the Judge's question? You have not answered it yet.

A. Haven't I answered it yet?
Q. No.
A. I thought I had.

By Commissioner Klinger:

Q. Well, you selected Canton but you left Ada out, was that intentional?

A. No, I don't think that was, Judge. This is just those I investigated. As I say, it is a summary of my investigation of that. There is no particular reason why I should have left out any town.

Q. Did you pick out the highest you could have gotten or did you make a selection to get the actual average prices?

A. We tried to show here what is the general price of gas.

Q. Was there any reason for not taking all of them?

A. The only thing is, to take all of the towns in Ohio, undoubtedly we would have a tremendous amount of work to go over this. I just picked out the prominent towns,

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[fol. 796] those in proximity——

Q. You have Cleveland mentioned, but you omitted Toledo and Columbus. You omitted Findlay. You omitted Cincinnati. Is that just accidental?

A. We could check through your records here at the Commission and supply those.

Q. Yes, I understand that. But you have provided an exhibit here, and I just wondered whether there was any method about it or why?

A. Nothing particular.

Q. You don't know why you put Lima and Canton on and then omitted Ada and Findlay and Toledo?

A. No, I haven't any explanation to offer on that. As I say those things are all of record here with your Commission, and if you want them in here, we will get them put in.

By Chairman Geiger:

Q. Where did you get the information from which you make up this list?

A. I think I testified to that before Your Honor, and also awhile ago, that I got it through your files here, through the files of the Public Utilities Commission, through Trade

Journals and other information which we have that gives this information.

Q. Now, did you get any other information that is not set out in this compilation?

A. No, that is all I had.

Q. This is all you got?

A. Yes, sir.

Mr. Mullin: Our information is that Toledo, Columbus and Cincinnati all pay the same rate, 45 cents.

Mr. Rush: Does not Columbus retail it at 48 cents?

Mr. Mullin: We are talking about the price at the city gates.

Mr. Rush: Are you testifying?

Judge Matthews: I am just told by Mr. Winans that 845

[fol. 797] Findlay and Ada are both of them served by the Ohio Fuel Gas Company as a distributing company, not as a wholesaler. We are only putting on here the wholesale prices.

Commissioner Bricker: What is the distribution price at Findlay?

Judge Matthews: I don't know.

Commissioner Bricker: Do you know, Mr. Howland?

The Witness: No.

Mr. Klapp: There are a number of outstanding localities in the State of Ohio that we certainly would want included in any such report as that.

Judge Matthews: You bring in yours. Here is what we are tendering.

By Commissioner Bricker:

Q. Who gave you this list of towns on which you are testifying?

A. I picked it up.

Q. You did it yourself?

A. Yes.

Chairman Geiger: Anything further?

Mr. Rush: Here is only one other suggestion. The witness can testify as to what a fair value is if he is qualified as a witness, if he wishes to state his qualifications in connection with that exhibit, that he has made a study of that thing. I don't see how he can ask that the exhibit go in.

If he wants to qualify as an expert, that is a different matter.

Chairman Geiger: We will admit the exhibit subject to cross-examination and a different list if you care to introduce it.

Mr. Rush: The record may show the objection and note the exception.

Judge Matthews: It may be admitted as an exhibit?

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[fol. 798] Chairman Geiger: Yes.

And thereupon the paper writing above referred to was offered, introduced and admitted in evidence on behalf of the Dayton Power & Light Company, subject to the objection and exception of the protesting municipalities, and is herewith submitted, marked company Exhibit No. 13, and made a part hereof.

Judge Matthews: Cross-examine if you desire.

Mr. Rush: If we are going to cross-examine on it, may we have a copy of the exhibit?

Judge Matthews: Now we have Mr. Howland's Exhibit, the allocation of operating expenses. I would like to have the gentlemen get through their cross-examining so far as we have gone, and after lunch hour we will bring in our exhibit on allocation of expenses.

Chairman Geiger: All right, gentlemen, do you care to cross-examine Mr. Howland on the exhibit or other matters?

Cross-examination.

By Mr. Rush:

Q. Mr. Howland, at the last session you testified that the common stock of the Dayton Power & Light Company was owned by the Columbia Corporation, the common voting stock? Is that true?

A. I testified that the common stock was owned by the Columbia Corporation.

Q. Now, by Columbia Corporation, do you mean the Columbia Gas & Electric Corporation, as distinguished from

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[fol. 799] the Columbia Gas & Electric Company?

A. Mr. Rush, I think I gave you that quite clearly before, but I am willing to repeat it if you want it repeated. So far as I know they are separate corporations.

Q. Now my question is by "Columbia Corporation," do you mean the Columbia Gas & Electric Corporation?

Judge Matthews: We have pretty near a thousand pages of this record. This was all gone into before. It is all in the record. Why go into it again?

Mr. Rush: If the Commission please, in all the set-ups we can find in the Trade Journals, we find no reference to the Columbia Corporation. We do find reference to the Columbia Gas & Electric Corporation and the Columbia Gas & Electric Company. Now when Mr. Howland refers to the Columbia Corporation, we wish to know what he refers to.

The Witness: I do not think my testimony is confusing.

Judge Matthews: I withdraw my objection.

Q. When you referred to the Columbia Corporation, did you mean by that reference the Columbia Gas & Electric Corporation, as distinguished from the Columbia Gas & Electric Company?

A. Any place in which I mentioned in this testimony the Columbia Gas & Electric Corporation, that is what I meant. When I mentioned the Columbia Corporation, that is what I meant.

Q. Do you know what the Columbia Corporation activities are? Do they distribute gas or do they manufacture or take the gas out of the wells?

A. I know nothing about the Columbia Corporation except as I have already testified.

Q. You know absolutely nothing about it?

A. No, I don't know anything about it.

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[fol. 800] Q. Do you know whether it is a producing company?

A. No, sir.

Q. Do you know whether or not there is a Columbia Corporation?

A. I do.

Q. Your stock certificates will show that your stock has been issued to the Columbia Corporation?

A. They will.

Q. And not the Columbia Gas & Electric Corporation?
A. I answered your question.

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[fol. 801] Q. Now, in your minutes I find this resolution having been passed: "Resolved that the officers of this company hereby are authorized and directed to execute on behalf of the company the contract for the purchase of natural gas from the Ohio Fuel Gas Company in substantially the form as submitted to this meeting, said contract to cover a period from August 1st, 1928, to October 1st, 1929." Was that resolution an authority to the officers of the company, the proper officers, to enter into that contract?

A. Yes, I should say it was.

Q. That is the authority? The contract which you signed—did you have any other authority than this resolution?

A. The authority which is recognized as being the authority of all executive officers, such as president, vice president, secretary.

Q. Do you have anything in the minutes heretofore empowering you as vice president to enter into a contract?

A. To enter into a contract?

Q. Yes.

A. I don't think so.

Q. To enter into this contract?

A. I don't think so. In fact I would say no.

Q. And that contract that you submitted at the last session was dated and made August 1st, 1928, and you were authorized to make it on September 25, 1928?

A. What is your question?

Q. I asked you if you were authorized to make it on September 25, 1928?

A. I would answer that, Mr. Rush, in this way. You, as an attorney, have had experience in signing contracts,

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[fol. 802] executing contracts and preparing contracts, and you know that frequently contracts are made and dated just as this contract is dated, and then your date of signature will be the same, as is very frequently referred to in the contract. Sometimes the contracts are dated and they may be signed a month or two months after the date of the contract.

Q. I know that. But the question was, was this particular contract signed on August 1st? And you answered that it was?

A. I couldn't tell you what particular date the contract was signed, but it was signed as of August 1st.

Q. It was in force from August 1st on?

A. That is correct.

Q. You didn't get any ratification of it until in September?

A. That is correct.

Q. Then your testimony heretofore given that the officers entered into the contract and the Board of Directors thereafter ratified the act is correct?

A. If that is my testimony it is correct.

Q. That was your testimony, was it not?

A. The record will show.

Commissioner Bricker: You remember. Just answer the question.

The Witness: I don't know.

Commissioner Bricker: Don't argue with counsel.

The Witness: Your Honor, I cannot remember all of these cross questions these fellows are putting to me, and the records will show what they are.

Commissioner Bricker: If you knew then you ought to remember now, I would think.

Q. Can you answer the question?

A. There isn't any question that I know of. Were you

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[fol. 803] asking a question, if Your Honor please?

Commissioner Bricker: No, I suggested you answer the questions without arguing with counsel, and then further, you ought to know now as you knew when you testified in the beginning.

Q. Will you answer my question?

A. I answered your question.

(Question read.)

Commissioner Bricker: If you don't know, say so.

The Witness: What is his question again?

(Question read.)

A. I don't know whether I answered that it was or not, but I say this contract was signed as of August 1st, 1928,

isn't it? But whether it was signed that actual day or not I do not know.

Q. I just asked you whether you had heretofore testified that the officers entered into this contract and that the Board of Directors there after ratified the contract. Now, will you tell me whether or not that was your testimony heretofore?

A. I don't know whether it was or not.

Q. Will you answer the question? Is it a fact that the Board, the officers, entered into the contract and the Board of Directors later ratified that contract?

A. Probably that procedure was followed.

Q. Probably? Do you know?

A. No, I don't know definitely. This thing is over—practically two years old. I know the contract was signed as of—pardon me.

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[fol. 804] Q. Did you answer the question positively at the last session?

A. I would have to check up my testimony and find out.

Q. Do you know or do you not?

A. I don't know.

Q. You don't know whether you did or not? All right.

Judge Matthews: Do you know the actual date that that was signed?

The Witness: No, I don't.

Judge Matthews: Well, that is all then.

By Chairman Geiger:

Q. Were you present at the meeting?

A. Yes.

Q. Who was there, if you recall, representing the Ohio Fuel Gas Company?

A. At the meeting of the Board of Directors at which this contract was ratified?

Q. Yes.

A. No one.

Q. No one?

A. No.

Q. Was the contract sent to you by mail?

A. I couldn't answer your question on that, Your Honor, whether it was sent by mail or somebody delivered it in person.

Q. But it was submitted to you without the intervention of anybody representing the Ohio Fuel Gas Company?

A. Yes.

Q. Personally present?

A. Yes.

Q. Now, at that time was your company represented by the Columbia Engineering & Management Company?

A. Yes, we were operating under that Engineering & Management contract at that time.

Q. Were they the ones who entered into the contract?

A. I did not get your question.

Q. Was the contract entered into under their management?

A. Yes, sir.

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[fol. 805] Q. Under the management of the Columbia Engineering & Management Corporation?

A. Through the officers of the Dayton Power & Light Company.

Q. But the Dayton Power & Light Company were doing then what the Engineering & Management Corporation told them to do; is that correct?

A. No, sir.

Q. They were operating under that contract, a copy of which has been introduced?

A. Yes, they were.

Q. That provided a good many things, but it was at least after that contract was signed with the Columbia Engineering & Management Company?

A. Yes, sir.

Q. Who represented the Ohio Fuel Gas Company? The contract was made with them, was it not?

A. It was made with the Ohio Fuel Gas Company.

Q. Who were there at the directors' meeting?

A. Beg pardon?

Q. Who was there representing the Ohio Fuel Gas Company?

A. There was no one of the Ohio Fuel Gas Company represented at this directors' meeting in which it was——

Q. Did you have any prior conference or meeting with the officers of the Ohio Fuel Gas Company with reference to this contract?

A. Yes, sure.

Q. When was that?

A. I don't know the dates, Your Honor.

Q. Do you know who was there?

A. As I recall, Mr. Cross.

Q. Mr. who?

A. Mr. Raymond Cross.

Q. Who is he?

A. He is president of the Ohio Fuel Gas Company, I believe, as I read here.

Q. Where was that meeting held? In New York or in Dayton?

A. I think in Columbus.

Q. Columbus? You have no office in Columbus? Was it

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[fol. 806] held at the office of the Ohio Fuel Gas Company?

A. At the office of the Ohio Fuel Gas Company.

Q. Who attended that meeting representing the Dayton Power & Light Company?

A. Mr. O. H. Hutchings, one of our vice presidents; and I was there.

Q. You were there?

A. Yes.

Q. Now, was the question of rate at the gateway discussed at that meeting?

A. Yes, quite a bit.

Q. What was the original rate proposed?

A. I don't recall.

Q. You were there and took part in the discussion?

A. Yes.

Q. Well, did you get any less rate than that that was originally proposed?

A. I don't recall, Your Honor, what the details of that discussion were.

Q. You remember you did have such a discussion? At least you testified to it before, that there was a good deal of discussion about the rate? Well, were the Columbia Engineering & Management Company present at the Columbus meeting?

A. I cannot tell you all of the people who were there.

Q. Well, it was a purely a pro forma meeting, wasn't it? That is, they came out from New York—take that out. Where did Raymond Cross come from?

A. Raymond Cross lives in Columbus.

Q. From Columbus? Was there anybody there from New York?

A. As I recall I think Mr. Pugh was there probably.

Q. Who?

A. Mr. Pugh.

Q. Representing the Columbia Gas & Electric Company?

A. Possibly.

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[fol. 807] Q. Who represented the Columbia Gas & Electric Company at that meeting either in Columbus or——

A. Mr. Pugh would be representing the Columbia Engineering & Management Corporation.

Q. The what?

A. The Columbia Engineering & Management Corporation.

Q. Well, who represented the Columbia Gas & Electric?

A. I don't know that there was a representative there for them.

Q. Except that the Columbia Engineering & Management Company was owned by the Columbia Gas & Electric Company?

A. I think that is true.

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[fol. 808] Cross-examination.

By Mr. Klapp:

Q. I have this one question. There were some questions this morning by the Commissioner in regard to the representative of the Columbia Engineering & Management Corporation being present at the negotiations leading up to the contract for wholesale gas, which was made under date of August 1st, 1928. I would like to ask you to what extent the Columbia Engineering & Management Corporation took part in those negotiations?

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[fol. 809] A. Naturally those negotiations would be taken —a great deal of part was taken by the Columbia Engineering & Management Corporation, the Ohio Fuel Gas Company and our company. When I say "our company" I refer to the Dayton Power & Light Company.

Q. Now, did the Columbia Engineering & Management Corporation make any specific recommendations to your company in regard to this contract?

A. I would not say that they made any specific recommendations, but it was generally discussed, and I believe I testified before in the proceedings had heretofore that we recommended we adopt this contract, and when I say, "we" I mean the Dayton Power & Light Company.

Q. You recommended to whom?

A. The Engineering & Management Corporation.

Q. Did they pass their judgment on the matter then?

A. They said they thought it was the thing to do.

Q. Now in regard to that, is that recommendation, or we might call it a consultation, on the part of the Dayton Power & Light Company with the Columbia Engineering & Management Corporation a part of the service which the Columbia Engineering & Management Corporation furnishes to the Dayton Power & Light Company for that two per cent. of your gross income which you pay to them?

A. Yes.

Q. And you consulted with the Columbia Engineering & Management Corporation in regard to this contract under date of August 1st, 1928?

A. Yes, sir.

Q. Do you know whether or not the Ohio Fuel Gas Company sells gas to any distributing companies in Ohio outside of the Dayton Power & Light Company?

A. Yes, they do.

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[fol. 810] Q. Is that included in the exhibit which you submitted this morning?

A. Yes.

Mr. Klapp: That is all I have to ask.

The Witness: And I might say that they sell it to other distributing companies at a much higher price than we are paying for it.

Q. This question has been suggested. The exhibit which you submitted this morning over our objection does that include all of the companies or communities in Ohio to which the Ohio Fuel Gas Company supplies gas wholesale?

A. Well, I don't know whether it does or not, but it includes quite a large number.

Q. Your answer then being that you do not know about that particular point?

A. I do not know that it applies to all of the towns supplied by the Ohio Fuel Gas Company, but it applies to a number of towns in Ohio.

Q. Is the Ohio Fuel Gas Company still operating as a retailer of gas?

A. They are in some places I am told.

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[fol. 811] By Chairman Geiger:

Q. You gave us this morning a schedule which is identified as company's Exhibit No. 13, in which you set out certain city gate rates, supplied by a number of companies which you have enumerated in the schedule. Is it not a fact that every one of those companies, with the exception of two, are owned by the Columbia Gas & Electric Company.

A. I will have to refer to my folder.

Q. The two being the United Natural Gas Company——

A. You mean the seller in those lists, Your Honor?

Q. I beg your pardon.

A. You mean the name of the producing and delivering company?

Q. The name of the company producing or delivering gas at the city gates, the names of the two not being owned by the Columbia Gas & Electric Corporation being United Natural Gas Company and the Hope Natural Gas Company?

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[fol. 812] A. Well, Your Honor, I cannot say who owns those companies or what their affiliations are. There is the Northwestern Ohio Natural Gas Company also. I don't know its affiliations.

Q. Let me ask you this way then. Is it not a fact that all or a majority of the common stock of the following companies which were enumerated in your schedule is owned by the Columbia Gas & Electric Corporation: The Ohio Fuel Gas Company, the Natural Gas Company of West Virginia——

A. I don't know about that.

Q. The Union Gas & Electric Company, the Ohio Fuel Gas Company, the Northwestern Ohio Natural Gas Company?

A. I don't know about that company.

Q. The United Fuel Gas Company?

A. I would further answer your question, that a majority of the companies listed here, selling gas at gate rates, are the Ohio Fuel Gas Companies, but as to the affiliation of the companies you referred to, particularly the United Natural Gas Company, the Natural Gas Company of West Virginia, the Hope Natural Gas Company, the Northwestern Ohio Natural Gas Company—I don't know anything about their affiliations.

Q. The name of the distributing companies—how many of those are affiliated with the Columbia Gas & Electric Company by stock holding? In the first place do you know how many of the distributing companies are owned by the companies that are scheduled as the producing and delivering companies?

A. Very few of them I think, Your Honor.

Q. I note that the Hope Natural Gas Company is listed here as furnishing gas to a distributing company called East Ohio Gas Company, which furnishes gas to Cleveland,

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[fol. 813] Ohio. Now, do you know whether the Hope Natural Gas Company or the East Ohio Gas Company is affiliated with the Columbia Gas & Electric Company?

A. I have no personal knowledge about the East Ohio Gas Company, but I understand it is not in any way affiliated with the companies you mention.

Q. Looking at the schedule of rates, the one company that is not affiliated or at least one company not enumerated as affiliated—no, that is not right. Looking at the price of the gas furnished Cleveland, Ohio, by the East Ohio Gas Company, the producing company being the Hope Natural Gas Company, that is the least rate on the whole schedule, isn't it?

A. No.

Q. Is there anyone less than that? I think there is one 41 cents.

Mr. Keyt: 39 cents.

A. Portsmouth, Ohio is 39 cents. That is on the last page.

Q. Portsmouth?

A. The last page at the bottom.

Q. But at the last page at the bottom we find Portsmouth, Ohio, 39 cents?

A. Yes.

Q. That is the lowest rate?

A. Yes.

Q. That is not a new contract? That is the only one, practically the only one, in which you do not give the date of the expiration of the contract that is beyond the present date, which really now—beyond June, 1930?

A. I don't believe we say in any of these the expiration of the contract.

Q. What are these last dates you have?

A. The last dates are the rates.

Q. 9/12/30. Let us take as an example the one at Mt. Blanchard, Ohio, on the first page. That rate is 52 cents up to January 7, 1931; then between January 7, 1931, and

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[fol. 814] January 7, 1932, it is 53 cents, and it is on an increasing rate up to January 7, 1939; it starts at 52 cents and increases from January 7, 1931 up to January 7, 1939, at 60 cents.

Q. I don't get that one. What page is that on?

A. It is on the first page.

Q. Mt. Blanchard you say? Where you have more than one date opposite any town, it shows the rate at the different times?

A. Yes, it shows that the rate is increasing during the year.

Q. Well, the one that is the lowest, the 39 cents for Portsmouth, Ohio, does not have any date of expiration?

A. If Your Honor please, those do not indicate any date of expiration.

Q. Any date of rate?

A. No, that is the rate at the time we made the investigation.

Q. Now this contract was for less than a year, wasn't it, or a little over a year?

A. Wait until I refer to it, Judge. Wasn't it for two years? It is from August 1st, 1928, ending midnight on October 31st, 1929, but it is privileged to continue, and I believe paragraph 6 of that contract reads this way: "This agreement shall be effective as of midnight following August 1st, 1928, and shall continue in force until midnight following October 31st, 1929, and thereafter subject to cancellation and complete termination by either party upon not less than 60 days' written notice to the other party."

Q. That is, both the contracts under which you purchase gas may be terminated on sixty days' notice by either party?

A. This contract is. I just don't recall how the other contract reads, Judge.

Q. The other one refers to Washington Court House?

A. Washington Court House. I don't see any termina-

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[fol. 815] tion clause in this contract, looking over it hurriedly: I think it is stated in evidence in the earlier part of this proceeding that this contract had expired, but we are continuing to operate under this contract.

Judge Matthew: Anything else?

Q. Did I understand you to say there was no meeting of your Board of Directors of the Dayton Power & Light Company at the time you made the contract to purchase the gas at the gateway of Washington Court House?

A. No, I said I felt confident, Your Honor, that that matter was taken up with the Board, but possibly through an oversight of mine it was not made a matter of record in our minutes.

Q. The record that you have furnished us might not go back far enough to take that in?

A. I have searched that record to determine, and I found no action of the Board on that contract.

Cross-examination.

By Mr. Klapp:

Q. When you conducted your investigations that led up to the compiling of this report which you filed this morning Exhibit 13, I believe, did you make any investigation as to the price of gas charged at the gateways by the Ohio River Gas Company?

A. No, I don't think so.

Q. Were you informed that they supplied the city of Marietta, Ohio? You don't recall of making any investigation which would disclose the wholesale price of gas at the gateway by that company with the city of Marietta?

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[fol 816] A. No, I have no knowledge of that at all.

Q. You do not know what the price is that they paid down there?

A. No.

Q. As a fact then, you do not know that they supply gas wholesale at 35 cents to that municipality, or at retail at 35 cents?

A. No, I don't know anything about those rates.

Q. Did you follow any particular plan in compiling this statement of rates which you filed here this morning?

A. Referring to this exhibit?

Q. Yes, Exhibit 13?

A. No particular plan; picked them at random.

Q. In picking them at random you found only one case where a charge of less than 40 cents wholesale was made for gas?

A. Yes.

By Chairman Geiger:

Q. Did you know whether the City Council of Toledo passed a compromise rate ordinance on April 23rd, 1930?

A. No, I do not Judge. I don't know what action——

Q. Giving the Northwestern Ohio Gas Company, a subsidiary of the Columbia Gas & Electric Company or corporation, 75 cents minimum charge for the first thousand cubic feet, 60 cents for the next one thousand cubic feet, 45 cents per thousand for the next 3,000 cubic feet. 55 cents for the next 3,000 cubic feet, 60 cents for the next 4,000 feet, 65 cents for the next 10,000 cubic feet; 67 cents a thousand for all 20,000 cubic feet.

A. I have heard of that, Your Honor, but I don't know anything about it other than that.

Q. Do you know whether or not Cincinnati's City Council passed a temporary rate ordinance May 15th, 1930, providing for a gate rate schedule ranging from 65 to 50 cents, according to the amount of consumption, to be in effect from

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[fol. 817] the expiration of the present ordinance until a new franchise has been approved, in January, 1931?

A. I don't know anything in particular about that. I have heard it mentioned.

By Mr. Klapp:

Q. Mr. Howland, just before you leave the stand a question occurs to me. Did you receive any information con-

cerning wholesale rates in Ohio which were not included in this report of yours?

A. No, I don't think I did in Ohio. There were some that were outside of Ohio, but I thought for this proceeding here we better confine ourselves to as near Ohio as possible.

Q. And the lowest rate then that came to your attention or which you were able to discover in compiling this report was 39 cents?

A. Yes.

[fol. 818] (2) Annual Depreciation

(3) Taxes

[fol. 819] Ohmer E. Howland testified:

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[fol. 820] Q. Mr. Howland, are you familiar with the valuation made of the gas properties in the eight towns, known as Exhibit No. 2?

A. Yes, I am.

Q. You have studied this exhibit, have you?

A. Yes, sir.

Q. Is it a part of your duty to be informed about and keep the accounts of the revenues and expenses of the Dayton Power & Light Company?

A. It is.

Q. You are familiar with all of those things?

A. Yes, sir.

Q. All of the records and books of the company are under your supervision, are they not?

A. They are.

Q. Mr. Howland, what was the gross revenue derived by the Dayton Power & Light Company from the gas properties and the sale of gas in the eight towns involved in this proceeding?

A. For the year ending December 31, 1929, the total operating revenues from the sale of gas in these eight towns amounted to $741,622.00.

Q. Now in these eight towns in the gas division what were the operating expenses, including taxes but not including any allowance for depreciation or amortization?

A. Operating expenses before depreciation, but including taxes, amounted to $678,378.00.

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[fol. 821] Q. And the difference between the two was how much?

A. $63,244.00.

Q. Was that $741,622.00, any of it, estimated under the new rate that we are now collecting?

A. I understood, Judge, that you asked me for the estimated revenue for the twelve months' period. Those are the figures I gave. The figure of $741,622.00 includes the actual revenues received for the twelve months' period ending December 31st, 1929, plus $62,178.00 as the estimated increase under the proposed rates.

Mr. Mullin: For the portion of the year in which the old rate was collected?

The Witness: Yes.

Chairman Geiger: For how many months?

The Witness: That is the estimated revenue for the twelve months' period under the proposed rates.

By Judge Matthews:

Q. That is the estimated revenue under the new rate, proposed rate, for twelve months you say?

A. Let me get this straight for you.

Chairman Geiger: That is not what he said before.

Q. You have made up an exhibit that we have here, and we will introduce this and call it Exhibit No. 8. Take Exhibit No. 8 and tell what it shows, Mr. Howland.

And thereupon the paper writing above referred to was marked for the purposes of identification as company Exhibit No. 8.

Chairman Geiger: How would it do to let them see it? Have they seen Exhibit No. 8?

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[fol. 822] Judge Matthews: I don't know.

Mr. Keyt: No, we have not.

The Witness: No, they have not.

Mr. Klapp: We would like to see it.

Chairman Geiger: Then introduce it and give the high spots.

The Witness: Do you want to introduce it?

Judge Matthews: Yes. Have you got an extra copy? Let the solicitors have the extra copy.

And thereupon the paper writing above referred to was offered, introduced and admitted in evidence on behalf of the Dayton Power & Light Company and is herewith submitted, marked company Exhibit No. 8, and made a part hereof.

Q. Now, Mr. Howland, I think we will save time if you will check Exhibit No. 8 and explain it.

A. From cover to cover?

Q. Better explain it, yes.

A. I think you will find this Exhibit, in looking over it, is pretty——

Q. Why did you take December 31st, 1929, as the time for making up Exhibit No. 8?

A. Because our books are kept on a fiscal year period, which corresponds to the calendar year, from January to December inclusive, of each period.

Q. It is almost a practical impossibility to have made up this exhibit as of June 30, isn't it?

A. It is more convenient to handle any twelve months' period on a calendar basis than it is on a split year.

Q. All right, now go ahead and explain Exhibit 8.

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[fol. 823] Chairman Geiger: Name the page you are testifying from.

The Witness: I have not started yet, Judge.

Chairman Geiger: All right.

The Witness: I just started to say that I think you will find the exhibit in the explanatory pages preceding each set of figures quite explanatory in itself. Just how deeply you want me to go into that, I do not know. Shall I take an expression from you on that or go ahead as I see fit?

Q. I think you better go ahead and explain it as you see fit.

A. Page 2 is a recapitulation of the valuation which has been presented here by Ford, Bacon & Davis in these proceedings, which shows a total estimated reproduction cost

new amounting to $1,415,813.00, and, depreciated, amounts to $1,176,811.00.

Q. Now the Dayton property about which you testified yesterday does not appear at all in any of the exhibits that have been introduced here does it?

A. None whatever. This exhibit here refers to the eight towns in these proceedings.

Q. But there is no part of the service building or any of that property you have testified to yesterday that is taken into account in making up these exhibits, is there?

A. No, it is not.

Q. All right, go ahead.

A. This Exhibit No. 2, as I said in the beginning, is a recapitulation or summary.

Q. Page 2 you mean?

A. Page 2 is a recapitulation or a summery from the Ford, Bacon & Davis valuation. Page 4 is the allocation of a rate base to commodity and customer cost. Page 4 is the breaking down—by the way, Judge, you find the explanation of that on page 3.

Page 4 is the breaking down of this summary of the
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[fol. 824] valuation to determine the amount of the value allocated to the customer cost and the commodity cost, which shows that the procedure in breaking down these costs is as follows:

Distribution system property, consisting of service line equipment, meters and meter installation, are allocated 100 per cent to customer cost as such equipment is needed for service to customers regardless of the amount of gas consumed.

Other items of distribution system property are allocated 31.69 per cent to customer and 68.31 per cent to commodity, on the basis of the annual amount of gas necessary for cooking and hot water heating as compared with the average annual consumption per customer.

General system property, undistributed construction expenditures, cost of financing, working capital and going concern value are allocated on the basis of the total of the distribution system property, namely, 55.42 per cent to customer and 44.58 to commodity.

By Chairman Geiger:

Q. Now I do not understand what you mean by allocation to customer and allocation to commodity. What do you mean my that?

A. If you will turn to the top of page 4——

Q. I have it.

A. You will find that, this summary, that this exhibit, going through all the way up until page 12, is the procedures to develop the necessary rate to be charged to customers in connection with these valuations and statements of expenses and income.

By Judge Matthews:

Q. The rate necessary to make a return on the property?

A. Yes, sir.

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[fol. 825] By Chairman Geiger:

Q. I still do not understand what you mean when you say under the column on page 4, "basis of allocation."

A. Probably if you will wait until we get up to that, it will be clear.

Q. Now, as a result of your calculation there you have 31.69 per cent?

A. Probably if you wait until we get to page 12, that will be clear to you.

Now page 6 shows a condensed income statement for the year ended December 31, 1929, for the cities and towns indicated, amounting to $679,444.00, or an average rate per M. C. F. sold of $.6193.

Operating expenses, including depreciation, but before taxes, amounted to $697,529.00, or $.6358 per M. C. F. sold.

Total taxes amounted to $22,830.00, or $.0226 per M. C. F. sold.

Return of eight per cent on value of property amounts to $94,144.00, or $.0858 per M. C. F. sold.

Chairman Geiger: What page are you on now?

The Witness: I am reading from page 5, which is explanatory of page 6.

Chairman Geiger: All right.

The Witness: Total operating expenses, taxes and return on property value amounted to $816,503.00, or $.7442 per M. C. F. sold.

It is therefore apparent that the company had an annual deficiency in revenue to cover operating expenses, taxes and return on property of $137,059.00, or $.1249 per M. C. F. sold.

Turning to page 8, the explanation for which is on page 7, allocation of expenses to customer cost and commodity cost.

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[fol. 826] Purchased gas expense is allowed 100 per cent. to commodity cost, as the company does not produce any gas, but purchases its entire gas supply wholesale at 45 cents per M. C. F. in accordance with the contract.

Distribution expenses, consisting of superintendence, distribution line labor, line supplies and expenses, other distribution supplies and expenses, maintenance of distribution lines and maintenance of other equipment, are allocated on the basis of 31.69 per cent. to customer cost and 68.31 per cent. to commodity cost, as previously explained on page 3.

Other items of distribution expense consisting of remove and reset meters, inspect and test meters, meter department supplies and expenses, maintenance of service lines and maintenance of meters, are allocated on the basis of 100 per cent. to customer cost, as these items are direct charges, to customer cost regardless of the amount of gas used.

Utilization expenses, commercial expenses and business promotion expenses, are allocated on the basis of 100 per cent. to customer cost, as these items are constant, regardless of the amount of gas used.

Turning to page 10, the explanation for which is on page 9, allocation of expenses to customers and commodity costs, which is a continuation of that appearing on page 8, general administration expense, excluding operating engineering and service fees, are allocated on the basis of 79.66 per cent. to customer cost and 20.34 per cent. to commodity cost, which is the ratio of customer and commodity cost to total distribution, utilization, commercial and business promotion expense, as shown on bottom of page 8.

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[fol. 827] Operating engineering and service fees are allocated on the basis of 31.69 per cent. to customer cost and

68.31 to commodity cost, which is the ratio of average necessary gas to average annual consumption.

Uncollectable accounts are allocated 100 per cent. to customer cost as it applies wholly to customers.

Injuries and damages, insurance, gas used by company, are allocated on the basis of 79.66 per cent. to customer cost and 20.34 per cent. to commodity cost, as explained at the bottom of page 8.

Depreciation, which represents 4.0 per cent. of total depreciable property new, is allocated on the basis of 55.42 per cent. to customer cost and 44.58 per cent. to commodity cost, which is explained on page 3, last paragraph.

Property taxes are allocated to customer cost and commodity cost on the same basis as depreciation.

Other taxes are allocated on the basis of 31.69 to customer cost and 68.31 per cent. to commodity cost, as explained on page 3, paragraph 2.

By Chairman Geiger:

Q. I don't see that we are gaining anything by simply reading this record unless we are then able to cross examine on it. Would you be willing to explain to me at this point or such other point as you may find desirable, what do you mean by customer costs?

A. We mean the cost that is applicable to the customer.

Q. I can guess that. But what does it mean?

A. I will finish my answer, if you will just give me a little time.

Q. All right, go ahead.

A. I don't mean to interrupt or to be curt about it. The customer makes that cost, which is cost of the customer,

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[fol. 828] regardless of whether there is any gas used or not.

Q. Now what would that cover?

A. I just read a lot of that in there.

Mr. Mullin: May I make a brief statement that may possibly help to clarify it? Certain of the property is used regardless of the amount of gas sold. You have, say, a thousand consumers. They must have a certain amount of property. Now all of that property and the return on it is allocated on the basis of so many consumers, of course.

It has nothing to do with the amount of gas sold. The same thing is true as to reading a meter. It costs just as much to read a meter that registers 1,000 feet of gas as if it registered a hundred thousand, of course. When you come to the price of gas and things like that, that is the commodity cost, and that is where the line is drawn.

Chairman Geiger: What I was trying to get at is how much of your expenses are charged to the customer, allocated to the customer cost?

Mr. Mullin: That is what he is explaining; the general statement as to how it is gotten at is all I was speaking of.

Chairman Geiger: The trouble is you make so many explanations that with my feeble brain I am overwhelmed.

Mr. Mullin: This is a somewhat technical arrangement that is used in practically all rate set-ups as between the customer charge and the commodity charge. That is especially true where you are not passing upon a flat rate. If you have an added rate for the first few hundred feet or first thousand, it is necessary to justify that. I do not un-

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[fol. 829] derstand that that is in controversy in this case, because the customer charge would double the charge that is made here, but this is the form in which these things are generally set up.

Chairman Geiger: I know all that. I have got that two or three times. What I want to ask, and I suppose it appears in here, but I want to get it short; what you have allocated to the customer is the cost to the company of serving the customer irrespective of what your gas costs?

The Witness: Yes.

By Chairman Geiger:

Q. It includes all of your plant and your overhead, your clerk hire, your bill collectors and everything incident to getting the money out of the customer. That hasn't anything, however, to do with what you sell to the customer?

A. It includes every item of cost, including the return on the property, that is necessary to serve customers, regardless of whether they use gas or do not use it.

Q. And the commodity cost is what you pay for the gas plus what?

A. The commodity cost represents the cost of the gas plus all expenses incident to a distribution of that gas.

Q. Now, how do you differentiate? Say you have a bunch of people that are serving these customers; there are clerks in the office, bookkeepers, stenographer, presidents, vice-presidents; clerical forces and a lot of people; would that go to the customer cost or the commodity cost, or part one way and part the other?

A. Well, go back here to page——

Q. It is all set out in this, is it?

A. It is all set out in detail.

Q. All right, we will study it out. Never mind the detail.

A. On page 12 of this exhibit it shows that the necessary

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[fol. 830] rate for customers, building up the figures from the preceding pages on this exhibit, would be per meter per month $1.0932. Commodity costs would be $.5846. Or we could state that in another way, in which it would be, say, for the first 500 cubic feet of gas, your customer charge, $1.0932; your commodity cost or your gas cost, the cost of your gas, including its distribution and so forth, would be .2923, or, total, $1.3855.

Q. What page are you reading from? 12?

A. That is not on page 12. I am looking at page 12, but this is from my own notes from page 12. Going on to page 14 of this exhibit, it shows the classification of sales and the total sales and the average number of customers for the twelve months' period ending December 31, 1929.

Q. Going on to page 16, which is, I think, the page you have been looking for, Judge, page 16 shows that the revenue received for the year ended December 31, 1929, under the expired rates, amounted to $679,444.00, or $.6193 per M C. F. sold.

Total operating expenses, including the purchased gas and all other expenses, distribution expenses, utilization expenses, commercial expenses, business promotion expense, general administrative expenses, miscellaneous general expenses, and depreciation, amounted to $697,529.00. Taxes, including property tax, excise tax and other tax, amounted to $24,830.00, or a total operating expenses, including depreciation and taxes, of $722,359.00, or a net income in red, or a deficit, of $42,915.00, under the proposed

rates, and adjusting the expenses accordingly, is shown in the next to the last column on page 16. The estimated revenue, assuming that there is no reduction in the use
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[fol. 831] of gas effected by a change of rate, the revenue would be $741,622.00.

By Chairman Geiger:

Q. Where do you find that figure?

A. In the next to the last column on page 16, at the top of the page.

Q. I have got it.

A. Following that column, Judge, the total operating expenses, including all of the expenses already indicated in the other column, amount to $698,773.00; taxes of all characters, property, excise, federal income, and so forth, would come to $27,758.00, or total operating expenses and taxes of $726,531.00, or a net income of $15,091.00, or a return of 1.28 per cent. on a property value of $1,176,811.00.

Q. Too little, isn't it?

A. Quite little. Just for your information, take the same figure for revenues as under the estimated revenue for the twelve months' period, $741,622.00; take the expenses as actually existed for the twelve months' period, 1929 there, before depreciation, but including taxes, $678,378.00; leaving a net before depreciation of $63,244.00. Now you gentlemen can figure what rate of return that would be, including depreciation on the property value. You will find it will run about nine and one-half per cent., which would represent probably a seven per cent. return, and two and one-half per cent. depreciation charge, on a valuation of $675,726.00.

Q. Valuation of what?

A. The figures I just read in the record would indicate that a return before depreciation would be equivalent to nine and one-half per cent. return on $665,726.00.

Judge Matthews: Our value is over a million.

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[fol. 832] The Witness: Yes.

Q. Nine and one-half per cent. before depreciation?

A. Yes.

Q. Is that the old rate?

A. That is under the proposed rates. That is the new proposed rates, and against which you place the actual operating expenses for the year 1929.

By Mr. Mullin:

Q. In other words, that includes no estimated increase in taxes?

A. It includes no estimated increase in taxes, no estimated increase in any other expenses, as the result of the estimated increase in revenues.

Q. And does not take into consideration any possible decline in your sales due to increased rates?

A. It does not.

Q. Would there be such?

A. There would, any place from five to seven per cent.

By Chairman Geiger:

Q. Now have you worked that figure out under the old rate?

A. Under the old rate?

Q. The old rate produced nine and one-half per cent. on what amount?

A. I will do it for you in just a minute. Would you like to have it?

Judge Matthews: You better work it out. I think the Judge is waiting for it.

The Witness: It would take a little time for it.

Chairman Geiger: Some of the numerous engineeers will do it.

Mr. Mullin: What is the question?

The Witness: Work out the actual in 1929 on the same basis as I did this which I just read.

By Chairman Geiger:

Q. Why do you take nine and one-half per cent. as the figure you wish to invite our attention to? Is that before depreciation?

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[fol. 833]

A. That is before depreciation. I wish to invite that to your attention, to show that the rate we are asking for in these proceedings is not a sufficient rate to return us a fair return upon the property. Normally we would expect at

least four per cent. depreciation, and at least an eight per cent. return, but I have suggested here a possible seven per cent. return and a two and one-half per cent. depreciation, which would mean that the net earnings before depreciation would be equivalent to $63,244.00, or equivalent to a return on a property value of $665,726.00.

Mr. Mullin: I would like to have it understood that the statement of the witness is not to be misinterpreted as waiving the company's claim to the full amount of return to which it thinks it is entitled, as well as the full amount of depreciation and amortization charge, which the witness has said should be eight per cent., and four.

By Chairman Geiger:

Q. I understand this—see if I have it right—that you have estimated under the new return you would have a figure before depreciation that would be equivalent to nine and one-half per cent. on a valuation of $665,726.00?

A. Correct.

Q. Now that is the new rate. I would like to have that nine and one-half on the old rate. But I wanted to ask you why you take nine and a half.

Mr. Mullin: Minimum of seven per cent. return and a minimum of two and one-half depreciation.

Q. That nine and one-half is to be split; nine and one-half equals seven per cent.——

A. Return.

Q. Plus two and a half per cent. depreciation?

A. Yes, sir.

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[fol. 834] Mr. Mullin: But the suggestion is that under no circumstances would the Commission think of allowing less than seven per cent. return or less than a two and a half per cent. depreciation. And if that is done, it requires a valuation of only $665,000.00 to sustain these rates, whereas we have proved a value in excess of $1,000,000.00. It is merely for the purpose of illustration.

Chairman Geiger: Sure. We appreciate all that. Of course, there are other ways of figuring.

Mr. Mullin: Yes: Yes, but that is an explanation of the witness' statement to make it clear.

[fol. 835] C. Rate of Return

[fol. 836] F. C. Hamilton testified:

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[fol. 837] Q. In your judgment, Mr. Hamilton, what is th necessary rate of return to attract capital to a busines such as that of this company here involving the plants her involved—the natural gas business?

A. I don't assume that unless there is a possibility o making 8 per cent, that anybody could be interested in th natural gas business. I know we could not.

Q. How does the rate of return which is necessary t attract capital to the natural gas utility compare with tha which is necessary to attract capital to a water company o an electric company, for instance?

A. I don't know about water companies so much; we onl have two or three; but electric companies, the securities ar more easily sold and capital more easily secured for a

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[fol. 838] electric company than it is for a natural ga company.

Q. Then you would say it would have to be a higher rat of return for the natural gas company?

A. It would have to be a higher rate of return.

Chairman Geiger: Well, now, suppose there is a com pany such as this particular one happens to be, a part o whose business is the natural gas business, and a part o which is the electric light and power; does that set up i a company offering to sell its securities, attract customer more than one that is devoted to electricity alone or ga alone?

The Witness: No, the fact that they have partiall natural gas and partially electricity would make their com bined securities a little less attractive than as if they ha the one kind of property, that was all electricity.

Chairman Geiger: But a little more attractive than i they had it all devoted to natural gas?

The Witness: Yes, sir.

Chairman Geiger: It depends on the proportion of th electricity and gas in the securities?

The Witness: Yes, sir, the electricity is on a more favor able situation for the simple reason that the use of elec tricity for instance here in Ohio with the average domesti

customer has probably doubled in the past ten years whereas that use of natural gas has not done anything like doubling.

Chairman Geiger: Well, the other element is very prominent, is it not, that with electricity, you can take a turbine and make it, while in the case of natural gas, when it is gone, you are out.

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[fol. 839] The Witness: That is an element of cost, that attaches to the natural gas, and another is the element of competition, of the ever-increasing chance of competition from electricity.

[fol. 840] Frank Parker testified:

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[fol. 841] Commissioner Bricker: Then you would add to that, of course, the discount before you would compute the amount which the company would have available for investment purposes.

The Witness: But there might not be any discount if you made your coupon rate high enough in your bonds and your dividend rate high enough in your common or preferred stock——

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[fols. 842-2457] Commissioner Bricker: Would you want to say what that rate would be?

The Witness: I don't know that I could answer it specifically for this property, but certainly the rate of return on the entire amount would vary with your corporate set-up, the proportion of bonds and proportion of preferred stock and proportion of common stock, but your fair rate of return ought to be ten per cent. as a bed-rock minimum, assuming again that the fair value of your property approximates the capitalization of your company.

Chairman Geiger: Do you mean by those two figures then that the cost of getting your money would be ten per cent. and your discount ten more per cent.?

The Witness: Oh, no, I have not included discount in my cost at all. Discount is entirely excluded from my answer and I say discount might be excluded from the entire problem if we make the coupon rate of your bonds and divi-

dend rate of your stocks high enough so that you could float those securities at par.

Chairman Geiger: But your think a security, seven per cent. gas security would cost ten cents on the dollar to sell it in the recent market?

The Witness: Seven per cent. bond?

Chairman Geiger: Seven per cent. bond.

The Witness: Yes, I think so; and your preferred stock would probably have to carry yield of eight to nine per cent. and your common stock ten per cent. or more.

[fol. 2458] D. The following exhibits contained in the record:

Company Exhibits: No. 2, page 8, line 29 to and including line 17 on page 11; pages 25-40; No. 6, No. 8, page 16; No. 9, No. 10, No. 13, No. 16.

[fol. 2459] COMPANY EXHIBIT No. 2

Page 8, Line 29 to and Including Line 17 on Page 11; Pages 25-40.

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[fol. 2460] General Overhead Charges

General overhead charges on construction are classified as engineering and superintendence, administrative expenses during construction, interest during construction, organization costs, legal expenses during construction, in-

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[fol. 2461] surance and taxes during construction, and cost of financing. These overhead charges are unavoidable in the construction of a property and are directly a part of the cost of the physical property, as are materials and construction labor. The following tabulation shows general construction overheads which have been estimated to apply in the construction of this property:

	Distribution system	General property
Engineering and superintendence during construction	5.0%	1.0%
Administrative expenses during construction	2.0	2.0
Interest during construction	7.0	7.0
Organization cost	2.5	2.5
Law expenditures during construction Insurance during construction Taxes during construction	1.5	1.5
Cost of financing	4.0	4.0

The above percentages do not include any allowance for going concern value or any elements entering therein.

The engineering work during construction may be conducted by a department organized for this purpose or by the employment of an established engineering organization, the cost for comparable results being about the same. Included in this expense are the cost of preparation of designs and specifications, the review of bids for construction,

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[fol. 2462] checking contractors' estimates, general supervision of construction, laying out of the lines and mapping the system. All of this would extend over a construction period of not less than one year during which entire period this expense would be incurred.

The construction of a property of this size, involving the expenditure of a considerable sum of money in a limited period of time, requires the organization of a comprehensive administrative force.

Interest during construction has been allowed at the current rate of 7 per cent per annum. This estimate is intended to reflect the interest on the money tied up during the period of construction until such time as the property is put into operation.

Organization costs are those necessary for the development or promotion of the enterprise and include services and expenses of organizers and promoters, preliminary surveys and reports, charter expenses, legal and technical expenses pertaining to the advisability of the proposition

and its creation as a corporate entity, all incurred prior to the starting of construction; the preparation of prospectuses and interest on these expenditures during a preconstruction period.

Law expenditures during construction include such items as fees and expenses of general counsel and local attorneys in the various localities in which the utility renders service. It includes office expense of such attorneys, the cost of printing briefs, legal forms, testimony, reports, establishment of rates, witness fees, notarial fees, registration fees and miscellaneous expenses.

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[fol. 2463] Insurance and taxes during construction include fire insurance, public liability, damages in excess of liability insurance, property taxes and construction bonds.

The cost of financing includes the expense involved in assembling the necessary capital for the enterprise and must not be confused with bond discount which has not been considered in the estimates. This expense is that which would be incurred in the floating of securities and as the interest rate provides for the current market return upon the investment there is no discount to be considered.

Working Capital

Working capital as shown in the estimates includes an amount for materials and supplies on hand as of June 30, 1929, a reasonable allowance for cash in the bank, together with two months' average operating expenses and the average cost of gas purchased in one month, all based on the year ended June 30, 1929. No allowance has been made to cover stock of gas in the lines and meters.

[fol. 2464] Acct. 234—Distribution Line Equipment

[fol. 2465]

Key to Symbols Used in Acct. 234 To Indicate Kind of Pavement Overlying Pipe

Symbol	Kind of pavement
A	Asphalt
Ab	Asphalt block
Ac	Asphaltic concrete
Ak	Kentucky rock asphalt
B	Bituminous macadam
Bc	Bituminous concrete
Br	Brick
Btl	Bitulithic concrete
C	Cement concrete
Cs	Concrete sidewalk
G	Gravel
Gt	Gravel—surface treated with asphaltic oil
M	Macadam—waterbound
Mt	Macadam—surface treated with asphaltic oil
S	Stone

[fol. 2466] Acct. 234—Distribution Line Equipment

Kind of pavement (see key)

Pipe size (in.)	Top surface Sym-bol	Top surface Thick-ness (in.)	Base Sym-bol	Base Thick-ness (in.)	Cushion	Length (ft.)	Unit cost (A)	Estimated reproduction cost new as of June 30, 1929
Piqua, Ohio:								
Pipe, steel:								
1.5	Ab	2	C	7.5	Sand 1 in.	41	$1.0495	$43.03
1.5	Gt	....	G	18	.....	225	0.3526	79.34
2	A	2.5	C	6	.....	45	0.9061	40.77
2	Ab	2	C	7.5	Sand 1 in.	89	1.1036	98.22
2	Ac	2.5	C	5	.....	640	0.8644	553.22
2	B	....	S	8	.....	4,694	0.5166	2,424.92
2	Br	4	C	6	Sand 1 in.	3,835	1.0036	3,848.81
2	Btl	2.5	C	5	.....	76	0.8644	65.69
2	C	....	C	6	.....	48	0.6377	30.61
2	Cs	....	C	4	.....	247	0.6583	162.60
2	Gt	....	G	8	.....	14,560	0.4067	5,921.55
2	Mt	....	S	8	.....	5,552	0.4760	2,642.75
3	Ab	2	C	7.5	Sand 1 in.	796	1.3134	1,045.47
3	Ac	2.5	C	5	.....	247	1.0742	265.33
3	B	....	S	8	.....	228	0.7264	165.62
3	Br	4	C	6	Sand 1 in.	8,046	1.2134	9,763.02
3	Btl	2.5	C	5	.....	3,271	1.0742	3,513.71
3	C	....	C	6	.....	1,984	0.8475	1,681.44
3	Cs	....	C	4	.....	478	0.8681	414.95
3	Gt	....	C	8	.....	15,916	0.6165	9,812.21
3	Mt	....	S	8	.....	3,635	0.6858	2,492.88
4	A	2.5	C	6	.....	5,403	1.3158	7,109.27
4	Ab	2	C	7.5	Sand 1 in.	2,997	1.5399	4,615.08
4	Ac	2.5	C	5	.....	1,018	1.2686	1,291.43
4	Ak	1.25	Br S C	4 1 6	.....	307	1.2849	394.46
4	B	....	S	8	.....	8,596	0.8742	7,514.62
4	Br	4	C	6	Sand 1 in.	25,180	1.4266	35,921.79
4	Btl	2.5	C	5	.....	1,723	1.2686	2,185.80
4	C	....	C	6	.....	2,293	1.0111	2,318.45
4	Cs	....	C	4	.....	132	1.0347	136.58

Acct. 234—Distribution Line Equipment—Continued

Pipe size (in.)	Top surface: Kind of pavement (see key) Symbol	Top surface: Thickness (in.)	Base: Symbol	Base: Thickness (in.)	Base: Cushion	Length (ft.)	Unit cost (A)	Estimated reproduction cost new as of June 30, 1929
Piqua, Ohio—Continued:								
Pipe, steel—Continued:								
4	Gt	....	G	8	.....	44,320	$0.7496	$33,222.27
4	Mt	....	S	8	.....	947	0.8282	784.31
6	A	2.5	C	6	.....	1,488	1.6935	2,519.93
6	Ab	2	C	7.5	Sand 1 in.	290	1.9176	556.10
[fol. 2467]								
Pipe, steel:								
6	B	....	S	8	.....	46	1.2519	57.59
..	Br	4	C	6	Sand 1 in.	1,203	1.8043	2,170.57
..	Btl	2.5	C	5	.....	132	1.6463	217.31
..	C	....	C	6	.....	10	1.3888	13.89
..	Gt	....	G	8	.....	6,717	1.1273	7,572.07
6	Mt	....	S	8	.....	648	1.2059	781.42
8	Ab	2	C	7.5	Sand 1 in.	2,127	2.3410	4,979.31
..	Br	4	C	6	Sand 1 in.	1,554	2.2310	3,466.97
..	Btl	2.5	C	5	.....	1,523	2.1048	3,205.61
8	Gt	....	G	8	.....	156	1.5552	242.61
2	...	....	..	....	.....	13,332	0.3400	4,532.88
3	...	....	..	....	.....	13,295	0.5508	7,322.89
4	...	....	..	....	.....	18,898	0.6730	12,718.35
6	...	....	..	....	.....	4,061	1.0503	4,265.27
8	...	....	..	....	.....	88	1.4666	129.06
North Hampton, Ohio:								
Pipe, steel:								
2	Mt	....	S	10	.....	950	0.4760	452.20
3	Mt	....	S	10	.....	50	0.6858	34.29
1	...	....	..	....	.....	200	0.1916	38.32
1¼	...	....	..	....	.....	586	.2146	125.76
2	...	....	..	....	.....	1,667	.2862	477.10
3	...	....	..	....	.....	153	.4723	72.26
[fol. 2468]								
Sidney, Ohio:								
Pipe, steel:								
1¼	A	1½	C	6	.....	18	.7811	14.06
2	A	1½	C	6	.....	964	.8527	822.00
..	Br	4	C	5	Sand 1 in.	1,965	.9478	1,862.43
..	C	....	C	8	.....	315	.6977	219.78
..	Gt	....	G	10	.....	7,582	.4315	3,271.63
..	Mt	....	S	10	.....	18	.4760	8.57
3	A	1.5	C	6	.....	2,692	1.0625	2,860.25
..	Br	4	C	5	Sand 1 in.	3,431	1.1576	3,971.73
..	C	....	C	8	.....	993	.9075	901.15
..	Gt	....	G	10	.....	4,910	.6413	3,148.78
..	Mt	....	S	10	.....	20	.6858	13.72
4	A	1.5	C	6	.....	6,261	1.2550	7,857.56
..	Br	4	C	5	Sand 1 in.	19,332	1.3630	26,349.52
..	C	....	C	8	.....	702	1.0797	757.95
..	Gt	....	G	10	.....	7,234	.7778	5,626.61
6	A	1.5	C	6	.....	38	1.6327	62.04
..	Br	4	C	5	Sand 1 in.	231	1.7407	402.10
..	C	....	C	8	.....	532	1.4574	775.34

Acct. 234—Distribution Line Equipment—Continued

Pipe size (in.)	Kind of pavement (see key) Top surface Symbol	Top surface Thickness (in.)	Base Symbol	Base Thickness (in.)	Cushion	Length (ft.)	Unit cost (A)	Estimated reproduction cost new as of June 30, 1929
Sidney, Ohio—Continued:								
Pipe, steel—Continued:								
..	Gt	....	G	10	.....	815	$1.1555	$941.73
8	Br	4	C	5	Sand 1 in.	1,476	2.1648	3,195.24
1¼	....	....	..	....	.....	132	.2684	35.43
2	....	....	..	....	.....	17,208	.3400	5,850.72
3	....	....	..	....	.....	32,802	.5508	18,067.34
4	....	....	..	....	.....	34,540	.6730	23,245.42
6	....	....	..	....	.....	7,282	1.0503	7,648.28
8	....	....	..	....	.....	761	1.4666	1,116.08
[fol. 2469]								
South Charleston, Ohio:								
Pipe, steel:								
1½	Mt	....	S	8	.....	444	.4219	187.32
2	Mt	....	S	8	.....	3,662	.4760	1,743.11
..	C	....	C	7	.....	38	.6644	25.25
3	Mt	....	S	8	.....	8,448	.6858	5,793.64
..	C	....	C	7	.....	79	.8742	69.06
4	Mt	....	S	8	.....	3,186	.8282	2,638.65
..	C	....	C	7	.....	65	1.0415	67.70
6	Mt	....	S	8	.....	163	1.2059	196.56
1	...	....	..	....	.....	290	.1916	55.56
1½	...	....	..	....	.....	90	.2321	20.89
2	...	....	..	....	.....	9,536	.2862	2,729.20
3	...	....	..	....	.....	1,791	.4723	845.89
4	...	....	..	....	.....	1,165	.5785	673.95
Tippecanoe City, Ohio:								
Pipe, steel:								
1	G	....	G	8	.....	103	.2741	28.23
1¼	G	....	G	8	.....	364	.2971	108.14
2	Br	4	C	6	Sand 1 in.	163	1.0036	163.59
..	C	....	C	7	.....	25	.6644	16.61
..	G	....	G	8	.....	5,669	.3687	2,090.16
..	Gt	....	G	9	.....	1,972	.4188	825.87
3	Br	4	C	6	Sand 1 in.	36	1.2134	43.68
..	G	....	G	8	.....	1,547	.5785	894.94
..	Gt	....	G	9	.....	1,045	.6286	656.89
4	Br	4	C	6	Sand 1 in.	1,910	1.4266	2,724.81
..	G	....	G	8	.....	11,755	.7067	8,307.26
..	Gt	....	G	9	.....	6,163	.7635	4,705.45
[fol. 2470]								
6	Br	4	C	6	Sand 1 in.	1,481	1.8043	2,672.17
..	G	....	G	8	.....	671	1.0844	727.63
..	Gt	....	G	9	.....	30	1.1412	34.24
1¼	...	....	..	....	.....	92	.2684	24.69
1½	...	....	..	....	.....	246	.2859	70.33
2	...	....	..	....	.....	6,228	.3400	2,117.52
3	...	....	..	....	.....	2,251	.5508	1,239.85
4	...	....	..	....	.....	4,223	.6730	2,842.08
8	...	....	..	....	.....	230	1.4666	337.32

Acct. 234—Distribution Line Equipment—Continued

Pipe size (in.)	Kind of pavement (see key) Top surface Symbol	Top surface Thickness (in.)	Base Symbol	Base Thickness (in.)	Cushion	Length (ft.)	Unit cost (A)	Estimated reproduction cost new as of June 30, 1929
Troy, Ohio:								
Pipe, steel:								
2	Ab	2	C	6	Sand 1 in.	175	$0.9895	$173.16
..	Ak	1.5	C	6	.....	180	0.8527	153.49
..	B	....	S	8	.....	79	0.5166	40.81
..	Br	4	C	6	Sand 1 in.	657	1.0036	659.37
..	C	....	C	6	.....	130	0.6377	82.90
..	G	....	G	12	.....	8,745	0.4205	3,677.27
..	Gt	....	G	12	.....	108	0.4593	49.60
2½	G	....	G	12	.....	25	0.5315	13.29
3	Br	4	C	6	Sand 1 in.	209	1.2134	253.60
..	G	....	G	12	.....	14,930	0.6303	9,410.38
4	Ab	2	C	6	.....	2,707	1.4103	3,817.68
..	Ak	1.5	C	6	.....	472	1.2550	592.36
..	B	....	S	8	.....	9,857	0.8742	8,616.99
..	Br	4	C	6	Sand 1 in.	10,558	1.4266	15,062.04
..	G	....	G	12	.....	26,710	0.7654	20,443.83
..	Gt	....	G	12	.....	1,770	0.8093	1,432.46
[fol. 2471]								
6	Ab	2	C	6	Sand 1 in.	74	1.7880	132.31
..	Br	4	C	6	Sand 1 in.	3,692	1.8043	6,661.48
..	G	....	G	12	.....	990	1.1431	1,131.67
..	Gt	....	G	12	.....	895	1.1870	1,062.37
1½	...	....	..	....	.....	200	.2859	57.18
2	...	....	..	....	.....	9,658	.3400	3,283.72
3	...	....	..	....	.....	19,521	.5508	10,752.17
4	...	....	..	....	.....	22,581	.6730	15,197.01
6	...	....	..	....	.....	2,321	1.0503	2,437.75
8	...	....	..	....	.....	37	1.4666	54.26
12	...	....	..	....	.....	36	2.5234	90.84
Territory Adjacent to Troy, Ohio:								
Pipe, steel:								
2	...	....	..	....	.....	4,539	0.2862	$1,299.06
Washington Court House, Ohio:								
Pipe, steel, screw:								
2	A	2.5	C	7	.....	110	0.9619	105.81
..	Br	4	C	6	Sand 1 in.	176	1.0036	176.63
..	C	....	C	8	.....	5	0.6977	3.49
..	Gt	....	G	9	.....	784	0.4188	328.34
..	G	....	G	8	.....	291	0.3687	107.29
..	Mt	....	S	9	.....	90	0.4760	42.84
3	A	2.5	C	7	.....	305	1.1717	357.37
..	Br	4	C	6	Sand 1 in.	43	1.2134	52.18
..	Gt	....	G	9	.....	661	0.6286	415.50
..	G	....	G	8	.....	12	0.5785	6.94
..	Mt	....	S	9	.....	12	0.6858	8.23
4	A	2.5	C	7	.....	1,115	1.3793	1,537.92
..	Cs	....	C	4	.....	24	1.0347	24.83
..	Gt	....	G	9	.....	90	0.7635	68.72
..	G	....	G	8	.....	2,516	0.7067	1,778.06

Acct. 234—Distribution Line Equipment—Continued

Pipe size (in.)	Top surface: Kind of pavement (see key) Symbol	Top surface: Thickness (in.)	Base: Symbol	Base: Thickness (in.)	Base: Cushion	Length (ft.)	Unit cost (A)	Estimated reproduction cost new as of June 30, 1929
Washington Court House, Ohio—Continued:								
Casing:								
5-5/8	Mt	....	S	9	.....	34	$1.2734	$43.30
Pipe, cast iron:								
2	Br	4	C	6	Sand 1 in.	22	1.2345	27.16
3	A	2.5	C	7	.....	955	1.3204	1,260.98
..	Br	4	C	6	Sand 1 in.	3,755	1.3621	5,114.69
..	Gt	....	G	9	.....	1,295	0.7773	1,006.60
[fol. 2472]								
4	A	2.5	C	7	.....	1,512	1.5381	2,325.61
..	Br	4	C	6	Sand 1 in.	4,241	1.5854	6,723.68
..	Gt	....	G	9	.....	32	0.9223	29.51
..	G	....	G	8	.....	385	0.8655	333.22
..	Mt	....	S	9	.....	8	0.9870	7.90
6	A	2.5	C	7	.....	4,406	1.9158	8,441.01
..	Br	4	C	6	Sand 1 in.	1,761	1.9631	3,457.02
..	C	....	C	8	.....	367	1.6162	593.15
..	Gt	....	G	9	.....	2,184	1.3000	2,839.20
..	C	....	C	4	.....	114	1.5712	179.12
8	Mt	....	S	9	.....	30	1.7999	54.00
Pipe, wrought iron:								
¾	A	2.5	C	7	.....	180	0.8910	160.38
1	Br	4	C	6	Sand 1 in.	20	0.9683	19.37
..	Gt	....	G	9	.....	120	0.3835	46.02
1¼	Gt	....	G	9	.....	100	0.4262	42.62
1½	A	2.5	C	7	.....	168	0.9907	166.44
..	Br	4	C	6	Sand 1 in.	74	1.0324	76.40
2	A	2.5	C	7	.....	5,034	1.0459	5,265.06
..	Br	4	C	6	Sand 1 in.	6,964	1.0876	7,574.05
..	C	....	C	8	.....	139	0.7817	108.66
..	Gt	....	G	9	.....	9,744	0.5028	4,899.28
..	G	....	G	8	.....	581	0.4527	263.02
..	Mt	....	S	9	.....	5,923	0.5600	3,316.88
3	A	2.5	C	7	.....	3,417	1.4123	4,825.83
..	Br	4	C	6	Sand 1 in.	8,679	1.4540	12,619.27
..	Gt	....	G	9	.....	3,923	0.8692	3,409.87
..	Mt	....	S	9	.....	310	0.9264	287.18
4	A	2.5	C	7	.....	1,465	1.7589	2,576.79
..	Br	4	C	6	Sand 1 in.	4,243	1.8062	7,663.71
..	Gt	....	G	9	.....	916	1.1431	1,047.08
5	A	2.5	C	7	.....	365	2.0784	758.62
..	Br	4	C	6	Sand 1 in.	58	2.1257	123.29
..	Mt	....	S	9	.....	50	1.5278	76.37
6	Br	4	C	6	Sand 1 in.	20	2.4736	49.47
..	Gt	....	G	9	.....	20	1.8105	36.21
[fol. 2473]								
8	A	2.5	C	7	.....	831	3.0366	2,523.41
..	Br	4	C	6	Sand 1 in.	19	3.0466	57.89
Pipe, steel, screw:								
1	...	....	..	....	.....	1,600	0.2454	392.64
1½	...	....	..	....	.....	4,748	0.2859	1,357.45
2	...	....	..	....	.....	14,057	0.3400	4,779.38

Acct. 234—Distribution Line Equipment—Continued

Pipe size (in.)	Kind of pavement (see key) Top surface Symbol	Top surface Thickness (in.)	Base Symbol	Base Thickness (in.)	Cushion	Length (ft.)	Unit cost (A)	Estimated reproduction cost new as of June 30, 1929
Pipe, steel screw—Continued:								
3	...	....	..	....	.....	17,053	$0.5508	$9,392.79
4	...	....	..	....	.....	2,394	0.6730	1,611.16
Casing:								
5-5/8	...	....	..	....	.....	5,966	1.1178	6,668.79
Pipe, cast iron:								
2	...	....	..	....	.....	723	0.5709	412.76
3	...	....	..	....	.....	1,298	0.6995	907.95
4	...	....	..	....	.....	2,079	0.8318	1,729.31
6	...	....	..	....	.....	2,522	1.2091	3,049.35
8	...	....	..	....	.....	947	1.6280	1,541.72
Pipe, wrought iron:								
1	...	....	..	....	.....	288	0.3047	87.75
1¼	...	....	..	....	.....	376	0.3474	130.62
1½	...	....	..	....	.....	187	0.3688	68.97
2	...	....	..	....	.....	17,061	0.4240	7,233.86
3	...	....	..	....	.....	7,461	0.7914	5,904.64
4	...	....	..	....	.....	2,033	1.0526	2,139.94
5	...	....	..	....	.....	1,512	1.3717	2,074.01
6	...	....	..	....	.....	830	1.7196	1,427.27
Wilberforce, Ohio:								
Pipe, steel:								
1	Mt	....	S	10	.....	50	0.3814	19.07
2	Mt	....	S	10	.....	3,252	0.4760	1,547.95
1	...	....	..	....	.....	1,750	.1916	335.30
2	...	....	..	....	.....	3,138	.2862	898.10
Total Acct. 234:								
Reproduction cost new								$617,008.96
Less deterioration								$474,131.03

NOTE—(A) Unit cost of pipe, installed, including cost of cutting through and replacing pavement.

[fol. 2474] Acct. 235—Service Line Equipment

[fol. 2475]

Key to Symbols Used in Acct. 235 to Indicate Kind of Pavement Overlying Pipe

Symbol	Kind of pavement
A	Asphalt
Ab	Asphalt block
Ac	Asphaltic concrete
Ak	Kentucky rock asphalt
B	Bituminous macadam
Bc	Bituminous concrete
Br	Brick
Btc	Bitulithic concrete
C	Cement concrete
Cs	Concrete sidewalk
G	Gravel
Gt	Gravel—surface treated with asphaltic oil
M	Macadam—waterbound
Mt	Macadam—surface treated with asphaltic oil
S	Stone

[fol. 2476]

Acct. 235—Service Line Equipment

Pipe size (in.)	Average length (ft.)	No. of services	Unit cost	Estimated reproduction cost new as of June 30, 1929
Piqua, Ohio:				
½	15.6	17	$ 6.79	$ 115.43
¾	15.6	527	7.16	3,773.32
1	15.6	1,003	7.86	7,883.58
1¼	15.6	2,747	9.07	24,915.29
1½	15.6	137	10.13	1,387.81
2	15.6	63	12.41	781.83
2½	15.6	6	17.86	107.16
3	15.6	9	21.91	197.19
North Hampton, Ohio:				
1	16.62	61	7.86	479.46
1	14.49	17	7.49	127.33
Sidney, Ohio:				
¾	15.62	173	7.16	1,238.68
1	15.62	582	7.86	4,574.52
1¼	15.62	1,842	9.07	16,706.94
1½	15.62	19	10.13	192.47
2	15.62	23	12.41	285.43
3	15.62	6	21.91	131.46
4	15.62	1	27.19	27.19
South Charleston, Ohio:				
½	20.8	1	7.46	7.46
¾	20.8	13	7.84	101.92
1	20.8	90	8.62	775.80
1¼	20.8	291	9.91	2,883.81
1½	20.8	2	11.04	22.08
2	20.8	9	13.53	121.77
Tippecanoe City, Ohio:				
½	20.0	5	7.46	37.30
¾	20.0	146	7.84	1,144.64
1	20.0	244	8.62	2,103.28
1¼	20.0	392	9.91	3,884.72
1½	20.0	17	11.04	187.68

[fol. 2477]

2	20.0	8	13.53	108.24
3	20.0	3	23.73	71.19
Troy, Ohio:				
½	15.15	4	6.63	26.52
¾	15.15	37	6.99	258.63
1	15.15	458	7.67	3,512.86
1¼	15.15	1,864	8.86	16,515.04
1¼	10.5	143	8.02	1,146.86
1½	15.15	28	10.13	283.64
2	15.15	14	12.41	173.74
Territory adjacent to Troy, Ohio:				
1	1	71	5.04	357.84
1¼	12	16	8.23	131.68
2	2,000	1	569.89	569.89
Washington Court House, Ohio:				
¾	15.9	110	7.16	787.60
1	15.9	1,875	7.86	14,737.50

Acct. 235—Service Line Equipment—Continued

Pipe size (in.)	Average length (ft.)	No. of services	Unit cost	Estimated reproduction cost new as of June 30, 1929
Washington Court House, Ohio (continued):				
1	13.5	33	$ 7.49	$ 247.17
1¼	15.9	254	9.07	2,303.78
1¼	13.5	7	8.65	60.55
1½	15.9	17	10.13	172.21
2	15.9	34	12.41	421.94
3	15.9	1	21.91	21.91
Wilberforce, Ohio:				
1	18.2	36	8.24	296.64
1¼	18.2	6	9.49	56.94
2	18.2	1	12.97	12.97

[fol. 2478] Pavement Overlying Portions of Service Connections

Kind of pavement (see key)							
Top surface		Base					
Symbol	Thickness (in.)	Symbol	Thickness (in.)	Cushion	Length (ft.)	Unit cost (A)	Estimated reproduction cost new as of June 30, 1929
[illegible] Ohio:							
	2.5	C	6		2,608	$0.3670	$ 957.14
Ab	2.5	C	7½	Sand 1 in.	1,923	.5542	1,065.73
Ac	2.5	C	5	.....	1,161	.3392	393.81
Ak	1.25	Br C Sand	4 6 1	.....	380	.3486	132.47
B	..	S	8	.....	6,711	.1073	720.09
Br	4	C	6	Sand 1 in.	15,296	.4708	7,201.36
Btl	2.5	C	5	.....	3,662	.3392	1,242.15
C	..	C	6	.....	1,553	.1881	292.12
Cs	..	C	4	.....	69	.2018	13.92
Gt	..	G	8	.....	31,030	.0342	1,061.23
Mt	..	S	8	.....	2,982	.0804	239.75
North Hampton, Ohio:							
Mt	..	S	10	.....	370	.0804	29.75
Sidney, Ohio:							
A	1½	C	6	.....	4,177	.3314	1,384.26
Br	4	C	5	Sand 1 in.	12,185	.4337	5,284.63
C	..	C	8	.....	909	.2281	207.34
Gt	..	G	10	.....	6,438	.0508	327.05
Mt	..	S	10	.....	180	.0804	14.47
South Charleston, Ohio:							
Mt	..	S	8	.....	3,328	.0804	267.57
C	..	C	7	.....	144	.2059	29.65
Br	4	C	6	Sand 1 in.	36	.4708	16.95
Tippecanoe City, Ohio:							
Br	4	C	6	Sand 1 in.	1,950	.4708	918.06
C	..	C	7	.....	12	.2059	2.47
Cs	..	C	4	.....	76	.2018	15.34
G	..	G	8	.....	6,100	.0088	53.68
Gt	..	G	9	.....	3,378	.0422	142.55

Acct. 235—Service Line Equipment—Continued

[fol. 2479]

Pavement Overlying Portions of Service Connections—Continued

Kind of pavement (see key)							
Top surface		Base					
Symbol	Thickness (in.)	Symbol	Thickness (in.)	Cushion	Length (ft.)	Unit cost (A)	Estimated reproduction cost new as of June 30, 1929
Troy, Ohio:							
Ab	2	C	6	Sand 1 in.	106	$0.4781	$ 50.68
Ak	1.5	C	6	.....	109	.3314	36.12
B	..	S	8	.....	3,276	.1073	351.51
Br	4	C	6	Sand 1 in.	2,908	.4708	1,369.09
Cs	..	C	4	.....	99	.2018	19.98
G	..	G	12	.....	18,187	.0434	789.32
Gt	..	G	12	.....	839	.0693	58.14
Washington Court House, Ohio:							
As	2.5	C	7	.....	7,792	.4042	3,149.53
Be	4	C	6	Sand 1 in.	7,462	.4708	3,513.11
C	..	C	8	.....	107	.2281	24.41
Gt	..	G	9	.....	7,231	.0422	305.15
G	..	G	8	.....	491	.0088	4.32
Mt	..	S	9	.....	1,588	.0804	127.68
Wilberforce, Ohio:							
Mt	..	S	10	.....	241	.0804	19.38

Total Acct. 235:

Reproduction cost new $148,302.85

Less deterioration $106,778.03

(Here follows Company Exhibit No. 6, side folios 2480 & 2481)

[fol. 2480]

[fol. 2481]

Compilation of Natural Gas Se

Date	Company	Description of issue
May 1916	United Fuel Gas Company	First Mortgage Twenty Year S.F. Gold Bonds
June 1922	" " " "	" " " " " "
Aug. 1921	" " " "	Temporary 10-year Secured Gold Bonds
Jan. 1925	North Western Utilities, Ltd	First Mortgage 15-year S.F. Gold Bonds
June 1923	Southwestern Utilities Corporation	First Lien Collateral Convertible Gold Bonds
Aug. 1926	Interstate Natural Gas Company, Inc.	Closed First Mortgage 10-year S.F. Gold Bonds
Aug. 1927	Southern Kansas Gas Company	First Mortgage S.F. Gold Bonds, Series 1937
Aug. 1928	Memphis Natural Gas Company	First Mortgage S.F. 15-year Gold Bonds
Dec. 1928	" " " "	Preferred Stock cumulative, no par
Aug. 1929	Southern Natural Gas Corporation	First Mortgage 15-year S.F. Gold Bonds
Aug. 1929	" " " "	Convertible 15-year S.F. Gold Debentures
Aug. 1929	" " " "	Cumulative Preferred Stock, no par value
Aug. 1929	Mississippi River Fuel Corporation	Closed First Mortgage 15-year S.F. Gold Bonds
	Total	
	Average discount	
	Southern Natural Gas Corp.—assuming public offering of debentures and preferred stock, @	
	Average cost to Southern Natural Gas Co	

NOTE: (A) Total does not include items indicated by letter (A), and preferred stock when included has bee
(B) Price paid in each case was indicated price plus interest.
(C) In some instances the underwriters may also have received a bonus of common stock of which
(D) Cost of financing as shown on this statement includes on the Investment Banker's spread and do
(E) Data not available.

COMPANY EXHIBIT No. 6

as Security Issues, Showing Underwriting and Public Offering Prices and Cost of Financing (D)

	Stock purchase warrants	Dated	Interest rate	Amount of issue	Price paid (B) By underwriters (C)	Price paid (B) By public
ds	No	Jan. 1, 1916	6%	$1,500,000	$95	$100
	No		6%	1,000,000 (A)	(E)	98.50
	No	Aug. 15, 1921	7½%	2,000,000	92.50	98.25
	Bonus	June 1, 1923	7%	3,250,000	80	100
s	No	June 1, 1923	7%	2,000,000	87	98.50
nds	Yes	July 1, 1926	6%	10,500,000	101	105
	Yes	Aug. 1, 1927	6½%	2,500,000	87.50	98.50
	Yes	Aug. 1, 1928	6%	6,300,000	90	99.50
	....	.....	7%	10,000 Shares	90	101
	Yes	July 1, 1929	6%	13,000,000	88	97.50
	Conversion	July 1, 1929	6½%	7,500,000 (A)	88	.....
	....	.....	7%	50,000 Shares (A)	85	.....
nds	Yes	Aug. 15, 1929	6%	16,000,000 (A)	(E)	103
	.....	.....		$42,050,000 (A)		
s,,@ $97.50	.....	.....		$25,500,000		

s been taken at $100 per share.

hich no record is available.

nd does not include legal fees, engineers reports or other items of expense.

COMPANY EXHIBIT No. 6

Compilation of Natural Gas Security Issues, Showing Underwriting and Public Offering Price

Description of issue	Stock purchase warrants	Dated	Interest rate	Amount of issue
rtgage Twenty Year S.F. Gold Bonds	No	Jan. 1, 1916	6%	$1,500,000
" " " " "	No		6%	1,000,000 (A)
y 10-year Secured Gold Bonds	No	Aug. 15, 1921	7½%	2,000,000
rtgage 15-year S.F. Gold Bonds	Bonus	June 1, 1923	7%	3,250,000
Collateral Convertible Gold Bonds	No	June 1, 1923	7%	2,000,000
irst Mortgage 10-year S.F. Gold Bonds	Yes	July 1, 1926	6%	10,500,000
rtgage S.F. Gold Bonds, Series 1937	Yes	Aug. 1, 1927	6½%	2,500,000
rtgage S.F. 15-year Gold Bonds	Yes	Aug. 1, 1928	6%	6,300,000
Stock cumulative, no par	....	.....	7%	10,000 Shares
rtgage 15-year S.F. Gold Bonds	Yes	July 1, 1929	6%	13,000,000
ble 15-year S.F. Gold Debentures	Conversion	July 1, 1929	6½%	7,500,000 (A)
ve Preferred Stock, no par value	....	.....	7%	50,000 Shares
irst Mortgage 15-year S.F. Gold Bonds	Yes	Aug. 15, 1929	6%	16,000,000 (A)
.....				$42,050,000 (A)
g of debentures and preferred stock, @ $97.50				$25,500,000

d preferred stock when included has been taken at $100 per share.

ved a bonus of common stock of which no record is available.

n the Investment Banker's spread and does not include legal fees, engineers reports or other items of exp

Prices and Cost of Financing (D)

	Price paid (B)				
	By underwriters (C)	By public	Difference	Total cost of financing	Remarks
	$95	$100	$5	$75,000	Total issue authorized $15,000,000.
)	(E)	98.50	.....	.....	Part of above issue.
	92.50	98.25	5.75	115,000	Total authorized $3,000,000.
	80	100	20	650,000	Offered in Jan., 1925.
	87	98.50	11.50	230,000	Collateral consisted of bonds of North Western Utilities, Ltd. & bonus stock.
	101	105	4	420,000	Total issue $11,500,000, $1,000,000 issued for property.
	87.50	98.50	11	275,000	(Underwriters priced by J. T. Kimball.)
	90	99.50	9.50	598,500	
ıares	90	101	11	110,000	
	88	97.50	9.50	1,235,000	
)	88	.....	.....	.....	(Underwritten by Tri Utilities Corporation.)
ıares (A)	85	.....	.....	.....	(No record of public offering.)
)	(E)	103	.....	.....	
)				$3,708,500	
.....				$8.80 per $100	
				$2,572,500	
.....				$10.10 per $100	

of expense.

[fol. 2482] COMPANY EXHIBIT No. 8

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[fol. 2483] The Dayton Power & Light Company

Gas Division

For North Hampton, Piqua, Sidney, South Charleston, Tippecanoe City, Troy, Territory Outside of Troy, Washington Court House, and Wilberforce, Ohio

Comparative Income Statements Showing Result of Operations Under Expired Rate and Estimated Result Under Proposed Rate Based on Operations for Year Ended December 31, 1929

	Under expired rate		Under proposed rate	
	Amount	Average per M c. f. sold	Amount	Average per M c. f. sold
Operating revenue: (M c. f. sold 1,097,073)				
Revenue from sale of gas	$679,444	$.6193	$741,622	$.6760
Operating expenses: (M c. f. purchased 1,192,471)				
Gas purchased for resale @ $.45 per M	$536,611	$.4891	$536,611	$.4891
Gas purchased expense	470	.0005	470	.0005
Distribution expense	32,841	.0299	32,841	.0299
Utilization expense	2,246	.0020	2,246	.0020
Commercial expense	22,301	.0203	22,301	.0203
Business promotion expense	10,695	.0098	10,695	.0098
General administrative expense	38,395	.0350	39,639	.0361
Other general expense	9,989	.0091	9,989	.0091
Depreciation	43,981	.0401	43,981	.0401
Total operating expenses	$697,529	$.6358	$698,773	$.6369
Taxes:				
Property	$15,366	$.0140	$15,366	$.0140
Excise & other	9,464	.0086	10,334	.0094
Federal income	.....	.....	2,058	.0019
Total taxes	$24,830	$.0226	$27,758	$.0253
Total operating expenses & taxes	$722,359	$.6584	$726,531	$.6622
Net income	$42,915	$.0391	$15,091	$.0138
Return on property value of $1,176,811			1.28%	

[fol. 2484] Company Exhibits No. 9 and 10

[fol. 2485] COMPANY EXHIBIT No. 9

Gas Contract

The Ohio Fuel Gas Company and the Dayton Power and Light Company Piqua-Xenia Division

Agreement made as of the first day of August, 1928, between The Ohio Fuel Gas Company, a corporation of the state of Ohio (hereinafter called the Ohio company), party of the first part; and The Dayton Power and Light Company, a corporation of the state of Ohio (hereinafter called the Dayton company), party of the second part.

The Dayton company has acquired from the Ohio company, the gas distributing systems in and about the fol-
[fol. 2486] lowing communities in Ohio (which distributing systems are hereinafter collectively referred to as the Piqua-Xenia division):

Bellbrook, Bradford, Cedarville, Centerville, Covington, Fort Loramie, Greenfield, Jamestown, Jeffersonville, Minster, New Bremen, New Carlisle, North Hampton, Piqua, Piqua Rural, Pleasant Hill, Sabine, Sidney, South Charleston, Tippecanoe City, Troy, Versailles, West Milton, Wilberforce, Xenia and Xenia Rural.

The Ohio company owns natural gas transmission lines through which it is able to supply natural gas to said distributing systems. The Dayton company desires to purchase from the Ohio company, and the Ohio company desires to sell to the Dayton company, natural gas to provide for the requirements of said distributing systems.

In consideration of the premises and of the mutual covenants and agreements herein contained, the parties hereto agree as follows:

1. The Ohio company agrees to sell to the Dayton company, and the Dayton company agrees to purchase and take from the Ohio company, such quantity of natural gas as it may require for the use of its consumers in the Piqua-Xenia division, such quantity to be not less than 1,250,000 M cubic feet during the period commencing on the effective date of this agreement and ending midnight October 31, 1928, and not less than 1,300,000 M cubic feet in each year thereafter, so long as this agreement shall remain in effect,

at the price of forty-five cents (45¢) for each one thousand cubic feet. Delivery by the Ohio company and acceptance by the Dayton company of said minimum annual amounts [fol. 2487] of gas shall be made in the following monthly percentages (and delivery of said minimum amount for the three months from the date of this agreement to October 31, 1928, shall be in monthly amounts bearing to each other the ratio which the percentages specified below for said respective months bear to each other:

November	9½%
December	12 %
January	12½%
February	12½%
March	11 %
April	8½%
May	7 %
June	5 %
July	4½%
August	4½%
September	5 %
October	8 %
	100 %

with an allowable variation for each day's delivery so long as the amount taken in each day is between 80% and 150% of the minimum amount deliverable during such day, according to the foregoing table, and an allowable variation for each month, so long as the amount taken in such month is between 90% and 125% of the minimum amount deliverable during such month, according to such table.

2. The Ohio company will cause said gas to be delivered to the Dayton company at the various measuring stations [fol. 2488] at the city gates of the towns in the Piqua-Xenia division and at the individual meters of the rural consumers in the Piqua-Xenia division. The Ohio company shall maintain at said measuring stations orifice meters or such other standard types of measuring devices as may be mutually agreed upon by the parties, and the volume of said gas shall be measured on a ten (10) ounce pressure basis above 14.4 pounds atmospheric and, when measured through an orifice meter or pitot tube, computation of the same shall

be based on a temperature of 40 degrees Fahrenheit flowing and 50 degrees Fahrenheit storage, according to Boyle's law for the measurement of gas at varying pressures, but without allowance for changes in temperature and barometric conditions from the aforesaid basis.

3. The Dayton company shall cause the meters at the city gates of said towns in the Piqua-Xenia division to be read daily, or as often as may be necessary, and shall cause the individual meters of the rural consumers of the Piqua-Xenia division to be read at least once in each month (unless prevented in individual cases by circumstances beyond its control) and shall keep the cards, charts and any other records used in determining the deliveries of gas at its Dayton office available at all reasonable times for inspection by the authorized representatives of the Ohio company. Such representatives shall also have the right of constant access to the measuring stations at the city gates for the purpose of inspecting and witnessing tests of the measuring apparatus used therein.

[fo]. 2489] 4. On or after the first day of each month, but not later than the twelfth day thereof, the Dayton company shall furnish the Ohio company a statement of the amount of gas delivered to the Dayton company hereunder at the city gates during the preceding month and the amount shown by readings of rural consumers' meters taken during the preceding month, and on or before the twentieth day of each month, the Dayton company shall pay the Ohio company at its Columbus office, for all gas so delivered.

5. The Ohio company shall have no dominion or control whatever over the gas after the same shall have been delivered as provided in this agreement, and shall be in no way responsible or liable for or on account of any conduct, act or thing touching said gas after it passes the point of delivery. The Dayton company agrees at all times and from time to time to hold the Ohio company and any company which may deliver said gas to the Dayton company on behalf of the Ohio company harmless from all liability and claims arising out of any conduct, act or thing touching said gas after delivery thereof to the Dayton company.

6. This agreement shall be effective as of midnight following August 1, 1928, and shall continue in force until

midnight following October 31, 1929, and thereafter subject to cancellation and complete termination by either party upon not less than sixty (60) days' written notice to the other party.

7. This agreement shall bind and run in favor of the parties hereto and their respective successors and assigns, [fol. 2490] as fully as though such successors or assigns were original parties hereto.

8. This agreement is executed in triplicate.

In witness whereof each of the parties hereto has caused its corporate name to be hereunto subscribed by its president or one of its vice-presidents and its corporate seal to be hereunto affixed and attested by its secretary or one of its assistant secretaries as of the day and year first above written.

The Ohio Fuel Gas Company, by Raymond Cross, President.

Attest: P. A. Alberty, Secretary. (Seal.)

The Dayton Power and Light Company, by Frank M. Tait, President.

Attest: O. E. Howland, Secretary. (Seal.)

COMPANY EXHIBIT No. 10

Articles of Agreement

Agreement, made this first day of January, 1927, by and between The Ohio Fuel Gas Company, hereinafter called the vendor, and The Dayton Power and Light Company, hereinafter called the vendee, both of which companies are corporations duly organized and existing under and by virtue of the laws of the state of Ohio.

[fol. 2491] Witnesseth

Whereas, the vendor is engaged in the business of producing, transmitting and selling natural gas in the state of Ohio, and the vendee is the owner of a natural gas distributing system at Washington Court House, the village

of Bloomingsburg, and rural consumers in the vicinity of each of said places, all in the state of Ohio, and

Whereas, the vendor and vendee desire to enter into an agreement whereby a supply of natural gas may be furnised the vendee for its consumers at said Washington Court House, the village of Bloomingsburg, and the rural consumers in the vicinity of each of said places.

In consideration of the premises and agreements, stipulations and conditions hereinafter set out, to be kept and performed by each of the parties hereto, it is agreed by and between said parties as follows:

First: Subject to the conditions, limitations, and stipulations hereinafter set forth, the vendor agrees to sell and deliver, and the vendee agrees to purchase and take from the date hereof, until midnight of December 31, 1928, all the natural gas which the vendee may need to supply the requirements of vendee's consumers at Washington Court House, the village of Bloomingsburg, and rural consumers connected to vendee's line in the vicinity of said Washington Court House, and said Bloomingsburg.

Second: Vendor shall deliver said natural gas and vendee shall receive the same at points to be agreed upon on the line of the vendor near Washington Court House and the village of Bloomingsburg, respectively.

Third: All said gas shall be measured by one or more [fol. 2492] pitot tubes, orifice or positive meters or other measuring devices of equal accuracy. For the purpose of this contract, a cubic foot of gas shall consist of one cubic foot at a pressure of ten ounces per square inch above an atmospheric pressure of 14.4 pounds per square inch, or 15.025 pounds per square inch absolute pressure at a temperature of 50 degrees Fahrenheit (commonly called storage temperature). In the absence of a recorded flowing temperature, 50 degrees Fahrenheit shall be assumed. The specific gravity of the gas being measured shall be determined by the use of an Edwards gas balance, or by the use of an equally accurate instrument at the beginning of this delivery, and as often thereafter as conditions may warrant. "Boyle's law" for the measurement of natural gases at varying pressures shall be applied, but without allowance for variations in the atmospheric pressure and temperature.

All necessary meters, appurtenant fixtures and structures necessary to properly protect the same shall be furnished, installed or erected (except as hereinafter provided by the vendor. Equal freedom of access to said meters or measuring devices shall be had by both parties. The vendor shall read the meters, furnish, place and remove any and all recording gauge charts and perform any other services necessary in connection with the measurement of said gas. The cost of installation of meters or other measuring devices, and the cost of operating said measuring devices, including the installation and removing of recording gauge charts, and the maintenance of said measuring devices shall be borne by the vendor.

[fol. 2493] As it will be to the mutual advantage of the vendor and the vendee to erect and occupy one building within which can be installed the necessary metering and regulating equipment of both, it is agreed that the vendor will erect the necessary building, the plans for which are to be agreed to by both contracting parties, and upon a site to be obtained by the vendor; the cost of said building to be equally divided and one-half assessed against each party. It is also agreed that the cost of maintaining said building shall be equally assessed against each party. It is further agreed that the annual cost of leasehold of the site upon which said building will be located will be equally assessed against each party throughout the period of this contract and any renewal thereof.

The vendee will at its cost and expense provide, own and maintain the necessary regulators and such other auxiliary meters and other equipment as it may find necessary or desirable to install within said building.

Fourth: Should the vendee challenge the accuracy of the measuring device or devices used, the vendor shall furnish a competent inspector to make an inspection of the measuring device or devices, at which inspection a representative of the vendee may be present. Any errors found to exist shall be adjusted, in so far as exact knowledge of such errors or contributing causes is obtainable. Such adjustment to be made for a period of not to exceed 40 days previous to the date of the challenge by the vendee. The meter charts shall be forwarded to the vendee each month for inspection, after which they will be returned to the vendor, who will keep them on file for one year after date of de-

[fol. 2494] livery, during which time they will be open to inspection of authorized parties at any and all reasonable times.

Fifth: The vendee shall pay to the vendor at its office at 99 North Front street, Columbus, Ohio, not later than the fifteenth of the month, at the rate of forty-five (45) cents net per thousand (1000) cubic feet, for all gas taken in accordance with the provisions of paragraphs one (1) and two (2) herein, during the preceding month. Should the vendee be in default of payment of any monthly gas bill due hereunder for a period of thirty (30) days after same shall become due, then the vendor at its option, shall have the right to cancel and annul this contract, by giving the vendee ten (10) days' written notice of its intention to so cancel and annul this contract, and at the expiration of said ten (10) days this contract shall be null and void without further notice.

Sixth: It is mutually understood and agreed that the gas so delivered and taken shall be such natural gas as the vendor may be from time to time transporting through its pipe line from which said gas is taken, and the vendor reserves the right to recover from all said gas such gasoline as may be contained in said gas, for its own use.

Seventh: All covenants, conditions and obligations of this agreement shall extend to and be binding upon the successors and assigns respectively of the parties hereto.

Eighth: The vendee hereby expressly acknowledges that the production of natural gas from wells, and the transportation thereof over long distances is subject to acci- [fol. 2495] dents, interruptions, diminutions of pressure, and failures of supply. Vendor, however, expressly agrees that it will exercise reasonable diligence and care to avoid any shortage or interruption of supply of natural gas hereunder, but it shall not be liable for any damage or loss that may be occasioned by any shortage or failure of gas, or diminution of pressure growing out of the failure or shortage of production of gas wells, or fields, breakage or accident, to lines or equipment, fires, strikes, riots, floods, and other acts of a kindred nature, due to causes beyond the control of the vendor. The vendor shall only be bound to furnish natural gas to the full extent that it may be

able to do so through the exercise of reasonable care and diligence in the acquisition of gas territory, the drilling of gas wells, the purchase of gas, and the transportation of gas through its lines to the point of delivery to the vendee, and at such a pressure and for such a period of time as the wells and pipe lines of the vendor are capable of furnishing gas.

It is expressly recognized by the vendee that the vendor may interrupt its service hereunder for the purpose of making necessary alterations and repairs, but only for such time as may be reasonable and unavoidable, and the vendor shall give to the vendee, except in case of an emergency, reasonable notice of its intention to do so, and shall endeavor to arrange such interruption so as to inconvenience vendee as little as possible.

In witness whereof, this agreement has been duly executed by the president or a vice president, and attested by the secretary or an assistant secretary, and the name and [fol. 2496] corporate seal of the respective parties has been duly affixed by the proper officers of each of said companies on the first day of January, A. D. 1927.

The Ohio Fuel Gas Company, by Raymond Cross, President.

Attest: ——.

The Dayton Power and Light Company, by O. H. Hutchings, Vice-President.

Attest: O. E. Howland, Secretary.

[fol. 2497]

[fol. 2498]

COMPANY EXHIBIT No. 13

Statement Showing a Number of Ohio, Indiana, Pennsylvania and New York State Towns Served With Gas, City Gate Rates With the Names of Gas Producing and Distributing Companies.

Name of town served with gas	City gate rate				Name of distributing company	Name of company producing or delivering gas at city gate
Andover, Ohio	$.60	per M c. f.			Andover Gas Company	United Natural Gas Company
Arlington and Mt. Blanchard, Ohio	.52	" "	to	1- 7-31	Arlington Natural Gas Company	The Ohio Fuel Gas Company
	.53	" "	"	1- 7-32		
	.54	" "	"	1- 7-33		
	.55	" "	"	1- 7-34		
	.60	" "	"	1- 7-39		
Buckeye Lake, Ohio	.52	" "	"	6-15-30	Lakeside Gas Company	The Ohio Fuel Gas Company
	.53	" "	"	6-15-31		
	.54	" "	"	6-15-32		
	.55	" "	"	6-15-33		
Buckeye Lake, Ohio	.52	" "	"	6-15-30	Magnolia Gas Company	The Ohio Fuel Gas Company
	.53	" "	"	6-15-31		
	.54	" "	"	6-15-32		
	.55	" "	"	6-15-33		
Buckeye Lake, Ohio	.45	" "			Clintonian Fuel & Oil Company	The Ohio Fuel Gas Company
Canfield, Ohio	.60	" "			P-O Power Company	Natural Gas Company of West Virginia
Cleveland, Ohio (A)	.418	" "			East Ohio Gas Company	Hope Natural Gas Company
Cygnet, Ohio	.52	" "	"	8-15-30	Consumers Natural Gas Company	The Ohio Fuel Gas Company
	.53	" "	"	8-15-31		
	.54	" "	"	8-15-32		
Delaware, Ohio	.46	" "	"	7- 1-30	Delaware Gas Company	The Ohio Fuel Gas Company
	.50	" "	"	12-31-30		

Delaware, Ohio	.50	"	"	12-31-30		
Fulda, Ohio	.50	"	"		Noll, Crum and Noll	The Ohio Fuel Gas Company
Hamilton, Ohio	.44+	"	"		City of Hamilton (Gas Dept.)	Union Gas and Electric Company
Homeworth, Ohio	.60	"	"		Homeworth Consumers Gas Company	Natural Gas Company of West Virginia
Kenton and Lima, Ohio	.55	"	"		West Ohio Gas Company	The Ohio Fuel Gas Company

[fol. 2499]

Lancaster, Ohio	$.45	per M	c. f.	to 6-23-30	City of Lancaster (Gas Dept.)	The Ohio Fuel Gas Company
	.46	"	"	" 6-23-31		
	.47	"	"	" 6-23-32		
	.48	"	"	" 6-23-33		
	.49	"	"	" 6-23-34		
	.50	"	"	" 6-23-35		
	.51	"	"	" 6-23-36		
	.52	"	"	" 6-23-37		
	.53	"	"	" 6-23-38		
	.54	"	"	" 6-23-39		
Oberlin, Ohio	.48	"	"	" 12-31-30	Ohio Electric Power Company	The Ohio Fuel Gas Company
	.49	"	"	" 12-31-31		
	.50	"	"	" 12-31-32		
	.51	"	"	" 12-31-33		
	.52	"	"	" 12-31-34		
	.53	"	"	" 12-31-35		
	.54	"	"	" 12-31-36		
	.55	"	"	" 12-31-37		
	.56	"	"	" 12-31-38		
	.57	"	"	" 12-31-39		
Portage, Ohio	.51	"	"	" 8-20-30	Arlington Natural Gas Company	The Ohio Fuel Gas Company
	.52	"	"	" 8-20-31		
	.53	"	"	" 8-20-32		
	.54	"	"	" 8-20-33		
	.55	"	"	" 8-20-34		
	.60	"	"	" 8-20-39		

COMPANY EXHIBIT No. 13—Continued

Statement Showing a Number of Ohio, Indiana, Pennsylvania and New York State Towns Served With Gas, City Gate Rates With the Names of Gas Producing and Distributing Companies.

Name of town served with gas	City gate rate				Name of distributing company	Name of company producing or delivering gas at city gate
Stony Ridge, Ohio.....	.52	"	"	" 4- 1-31	Auditor Gas Company	Northwestern Ohio Natural Gas Company
	.53	"	"	" 4- 1-32		
	.54	"	"	" 4- 1-33		
Tarlton, Ohio.....	.45	"	"		Village of Tarlton	The Ohio Fuel Gas Company
Valley City, Ohio.....	.51	"	"	" 6-30-30	Valley City Gas Service	The Ohio Fuel Gas Company
	.52	"	"	" 6-30-31		
	.53	"	"	" 6-30-32		
	.54	"	"	" 6-30-33		
	.55	"	"	" 6-30-34		
	.60	"	"	" 6-30-39		
Van Buren, Ohio.....	.51	"	"	" 8-22-30	J. A. and J. D. Poole (Van Buren Gas Co.)	The Ohio Fuel Gas Company
	.52	"	"	" 8-22-31		
	.53	"	"	" 8-22-32		
	.54	"	"	" 8-22-33		
[fol. 2500]						
Walbridge, Ohio.....	.52	per M c. f. to		9-12-30	Auditor Gas Company	Northwestern Ohio Natural Gas Company
	.53	"	"	" 9-12-31		
	.54	"	"	" 9-12-32		
Williamsport, Ohio.....	.45	"	"	"	Village of Williamsport	The Ohio Fuel Gas Company
Indiana Towns.....	.50	"	"	first 33-1/3 million cu. ft.	Central Indiana Gas Company	The Ohio Fuel Gas Company
	.41+	"	"	All excess.		
Ohio & Indiana Towns..	.47½	"	"	to 12-31-30	Western Ohio Public Service Company	The Ohio Fuel Gas Company
	.50	"	"	" 12-31-32		
	.55	"	"	" 12-31-37		
Portsmouth, Ohio.....	.39	"	"		Portsmouth Gas Company	United Fuel Gas Company

NOTE: (A) Point of measurement at the Ohio River.

[fol. 2501] COMPANY EXHIBIT No. 16

[fol. 2502] The Dayton Power & Light Company

Statement Showing Additions of Property Claimed by the Company Which Should Be Added To The Valuation Made by Ford, Bacon and Davis, Inc., Through Omissions Made In Not Allocating Certain Dayton Property To The Eight Protesting Towns

Title	Valuation of Ford, Bacon and Davis estimated reproduction cost as of June 30, 1929	Valuation of property as claimed by and through testimony as offered in this case. Estimated cost of reproduction new, less depreciation as of June 30, 1929	
	Depreciated	Additions to property	Total value less depreciation
Organization	$24,774	$.....	$24,774
Distribution system property:			
Land	$700	$8,744	$9,444
District regulator structures	2,496	.....	2,496
Other distribution system structures	.....	4,592	4,592
Gas receivers and district regulators	9,903	.....	9,903
Distribution line equipment	474,131	.....	474,131
Service line equipment	106,778	.....	106,778
Meters	137,907	.....	137,907
Meter installations	14,683	.....	14,683
Total distribution system property	$746,598	$13,336	$759,934
General property:			
Other general land	$2,071	$9,900	$11,971
Other general structures	10,090	41,644	51,734
General office equipment	7,825	8,530	16,355
General garage equipment	4,627	.....	4,627
General shop equipment General tools & implements	2,386	.....	2,386
Total general property	$26,999	$60,074	$87,073
Undistributed construction expenditures during construction:			
Engineering and supervision	$41,805	.....	$41,805
General officers and clerks salaries. General officers and clerks expenses Office supplies and expenses Law expenditures Insurance Taxes	19,819 14,864	....	19,819 14,864
Interest	54,152	.....	54,152
Total undistributed construction expenditures during construction	$130,640	.....	$130,640
Cost of financing	39,600	.....	39,600
Total	$968,611	$73,410	$1,042,021
Working capital including material and supplies	83,200	.....	83,200
Going concern value	125,000	.....	125,000
Total	$1,176,811	$73,410	$1,250,221

[fol. 2503]

Portions of the Record (Transcript of Testimony and Exhibits) Requested by the Appellee

[fol. 2504] OHMER E. HOWLAND:

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[fol. 2505] Chairman Geiger: Will you tell me if all of these classes of property existed there—you have employed a wonderful group of experts from Philadelphia or New Jersey or somewhere to come there and appraise your property, if that stuff belongs to that, if that stuff affects the rates in question, how does it come that you have overlooked it?

The Witness: It is possible anyone will make an omission in doing things of that character.

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[fol. 2506] Chairman Geiger: And you found it out?

The Witness: Certainly did.

Chairman Geiger: I should think those Philadelphia fellows ought to pay you something for that.

Mr. Lerch: They feel pretty badly about it, Judge.

[fol. 2507] F. H. LERCH, JR:

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[fol. 2508] Q. Proceed, Mr. Lerch?

A. In the building up of the unit costs, we started first with the actual performance of labor and material costs and to them added certain percentages for direct charges and materials, which are covered by the amount of direct labor and material. These have been listed on Page 8 of the report and cover purchasing and handling, loss and use of tools and so forth——

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[fol. 2509] Q. Under the head of "Direct Overhead Charges on Materials"?

A. Yes, sir.

Q. Explain that more in detail, if you please?

A. The direct overhead charges on materials cover an allowance for purchasing and purchasing accounting. This allowance is designed to cover the cost of the purchasing department.

Q. Could such a plant be constructed or reconstructed without incurring such charges?

A. No, sir.

Q. What are the actual facts of construction which cause these expenditures in building such a plant?

A. Well, after the specifications for material are got up or rather specifications for plant as a whole are made up, they are broken down into bills of material which are turned over to the purchasing department to be purchased according to the program of construction or according to any other factors, such as price, which might enter into the ordering of material. When the material has been received it must be accounted for; it must be checked in order that the payment for the material may be accurate and it must be handled, a lot of it kept under cover and so forth. Then in its use, when it goes out into the field, it must be checked to know that the material is all on hand and also that it is not lost on the job. There is a certain amount of loss and wastage in use which we allow for also in this account, and there is also in making the inventory a certain quantity of material which it is impossible to accurately reflect in our records or to actually inventory, especially in the buried materials; and those items are all taken care of by what I term here as direct overhead charges.

Q. What would you say as to each and all of these items

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[fol. 2510] being necessary cost of construction of the visible property?

A. They are actual costs; it is not a question of necessity; it is a question of actual expenditures made to do this work just the same as labor laying the pipe lines.

Q. Well, I mean could you construct without those charges?

A. No, sir.

Q. Proceed?

A. Then on the labor we have allowance as direct overheads for superintendence, of loss and use of tools, job administration and time keeping, public liability and property damage; insurance; incidentals and contingencies; contractors bonds and bond premium. The superintendence covered here is not the general superintendence which—

which is covered in a further item. This is direct supervision of a number of gangs working on one job.

Q. Mr. Lerch, in order to get the matter squarely before you, are any of the items which you are mentioning here as direct overheads on either materials or labor, included in whole or in part in the general overhead charges mentioned later in your report?

A. No, sir, they are not.

Q. All right, proceed?

A. This superintendence is the direct superintendence of a number of gangs. These built up prices start with the several foremen who have charge of the several different operations, such as ditching, pipe laying, back filling and so forth. All of these gangs must be started up and operated under one head and that is what we include as superintendence.

The item of loss and use of tools, of course, covers the loss of wrenches, skids, pipe jacks, shovels, picks and all other construction tools. The job administration and time

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[fol. 2511] keeping is the work done in the field in seeing that the records come into the administrative office in proper shape and are complete. Those offices as a rule make up the payrolls and et cetera. The public liability and property damage insurance is based upon the published rates in the State for this class of insurance and is computed as a percentage of the payrolls. It is customarily paid for as a percentage of the payroll audited by classifications. Incidentals and contingencies are allowed to cover those things which are not apparent in a completed plant; losses during construction—that is, loss of time arising from the delays inherent in city plant construction. The contractor's bond and premium covers the bond places on the contractor for completion of the work.

Q. Can you specify the percentages either in detail or as a whole, allowed for these items in your appraisal estimate? Your next sentence says they vary somewhat?

A. They vary in accordance with the nature. These overheads of the accounts cover the regulators, services and meters. That would be accounts 233, 235, 236 and 7, are as follows, purchasing——

Chairman Geiger: What accounts are you saying?

The Witness: Of accounts 233, 235, 6 and 7 covers expense that applies to regulators, services, line equipment, meters and meter installations and the percentage allowed for purchase is one-half of one per cent. For warehouse, warehouse handling and checking, one per cent. For loss and waste, two per cent. For incidentals——

Chairman Geiger: Direct overhead on those materials, have you got a per cent on that?

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[fol. 2512] The Witness: If you would like, I can read this and then give you a duplicate of it just to save you from writing.

Q. You have an exhibit that you can put in?

A. I have only got this one sheet in the working papers, but I can read it and then introduce it.

Q. Very well; it is not very long?

A. No.

Q. Proceed?

A. Contingencies and incidentals one per cent. The item appearing on Page 9 of material checked in the field is all included in the item of checking that I have given as one per cent.

Q. On Page what?

A. Page 8.

Q. You said Page 9?

A. I meant Page 8.

On the labor costs for these same accounts, namely, regulator installation, service installation and meter installation, the superintendence is two per cent.; the loss in use of tools one per cent; time keeping and checking in the field or job administration and time keeping, one per cent. Public liability and property damage, one per cent. Incidentals and contingencies, one per cent. We have considered that the company installed this work and consequently would not have contractor's bond or premium.

Chairman Geiger: Well, you work those per cents out into amounts of money?

The Witness: Yes, sir, we apply those?

Chairman Geiger: They are on that same sheet?

The Witness: No, these are simply the percentages; the built-up prices contain those percentages on other tabulations that we have here. On distribution line account, that

is account 234, the direct overheads on the pipe part of that
30
[fol. 2513] account are purchasing .5 of one per cent.; warehouse, handling and checking—that is all checking—one per cent. Loss and waste one per cent. Incidentals and contingencies two per cent. On the fittings and valves of account 234, the overheads are purchasing .5 of one per cent.; warehouse, handling and all checking, one per cent. Loss and waste four per cent; incidentals and contingencies, two per cent. On the labor cost of installing the distribution lines in account 234, the superintendence is three per cent. Loss and use of tools, two per cent.; administration and checking, two per cent. Public liability and property damage two per cent.; incidentals and contingencies three — one-half per cent.; contractor's bond and bond premium, one and a half per cent.; and contractor's profit on that account ten per cent.

Chairman Geiger: What is the ten per cent.?

The Witness: Contractor's profit on the laying of the pipe line.

Q. Mr. Lergh, could such a plant be constructed without incurring the charges you have specified to at least the amount you have named?

A. I think not, no, sir.

Q. Then the charges are conservative, are they?

A. In my opinion, yes, sir.

Q. What is the fact as to such allowances being made in making such appraisals, according to the general usages and custom of the engineering business or profession?

A. The general custom is to build up the prices for installation and for materials installed, including these direct charges as part of the units.

Chairman Geiger: Let me ask you just one general ques-
31
[fol. 2514] tion there.

The Witness: Yes, sir.

Chairman Geiger: If you were a contractor seeking to put in a competitive bid for the doing of this work, would you follow this same plan or some other plan?

The Witness: I would follow the plan that we have outlined here, in so far as it would cover the particular part of the work that I was going to do.

Chairman Geiger: Well, let us assume you were a general contractor going to do it all.

The Witness: I would follow then this plan, yes, sir.

Chairman Geiger: With all of these overheads?

The Witness: Yes, sir.

Chairman Geiger: And contingencies?

The Witness: Yes, sir, we do it when we estimate the cost of installing these plants.

Chairman Geiger: Have you ever installed a plant, acting as the contractor?

The Witness: Ford, Bacon & Davis has and I have been interested in the work that they have done as to checking items, preparing estimates and making prices and so forth for it.

Chairman Geiger: Of course, assuming that there are three or four contractors bidding on the same job; they do not come out the same in figures?

The Witness: No, sir.

Chairman Geiger: Where is it that you find the greatest variation between two and three contractors who are bidding—in the overhead?

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[fol. 2515] The Witness: No.

Chairman Geiger: Or what?

The Witness: It is as a rule the contractors bidding will be very much the same except for peculiar conditions which affects him alone. For instance, a contractor might have a lot of equipment in the immediate vicinity of his job that he is bidding on and he does not have to move that equipment in. In order to beat any other contractors' prices who may have to move it in, he gives the benefit of that in his bid; and the same thing is true, he may, in order to make a contract with the customer, with a company who does a lot of this work—and he wants to get in their employ—he may cut his profit or something of that kind or shave everything that he possibly can and even incur losses. I know those things actually happen because they have happened with us with contractors, but on the whole, if a contractor puts in a fair bid for the same work, they will be pretty much in agreement.

[fol. 2516] COMPANY EXHIBIT No. 2

P. 7, Line 19 to and Including Line 28, Page 8

7

[fol. 2517] Unit Costs

The unit costs applied to the inventory are based upon labor and material prices prevailing in the vicinities of the communities involved in this valuation as of June 30, 1929. The pricing of the materials and equipment has been based largely upon quotations received from manufacturers and from Company records where recent purchases have been made. The calculations of numerous items of the cost of various classes of construction have been made by engi-

8

neers experienced in the respective classes of construc-
[fol. 2518] tion found in the distribution plants involved in this report.

In estimating the cost of laying the distribution mains, it has been assumed that a considerable part of the trenching would be done by ditching machines; the unit costs applied to the distribution mains include the cost of cutting through and replacing the pavement which now overlies a portion of the mains and services in the communities involved in the valuation.

The unit costs for the installation of pipe lines, services, meters and generally of all materials, include an allowance to cover certain direct overhead charges which are part of the direct cost of the physical property in place. The items involved in material and labor direct overhead charges are as follows:

Direct Overhead Charges and Materials:

Purchasing and Accounting.
Warehousing, Handling and Checking.
Loss and Waste.
Material Checked in Field.
Incomplete Inventory and Contingencies.

Direct Overhead Charges on Labor:

Superintendence.
Loss and Use of Tools.

Job Administration and Time-keeping.
Public Liability and Property Damage Insurance.
Incidentals and Contingencies.
Contractor's Bond and Bond Premium.

These charges were expressed as a percentage of the primary cost of labor and materials and vary somewhat, depending upon the nature of the work.

[fol. 2519]

COMPANY EXHIBIT NO. 5

[fol. 2520]

Page 46

The Dayton Power & Light Company

Unit Cost Development

Summary of Direct Overhead Charges by Accounts Expressed in Percentages

	Acct. 231 district regulator structures	Acct. 233 gas receivers and district regulators		Acct. 234 distribution line equipment		Acct. 235 service line equipment		Acct. 236 meters	Acct. 237 meter installation	Acct. 248 other general structures
		Regulators	Fittings	Pipe	Fittings	Pipe	Fittings			
Direct overhead on material:										
Purchasing	0.5%	0.5%	0.5%	0.5%	0.5%	0.5%	0.5%	0.5%	....	....
Warehouse handling and checking	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	....	....
Loss and waste	....	2.0	4.0	1.0	4.0	1.0	4.0	2.0	....	....
Incidentals and contingencies	....	1.0	2.0	2.0	2.0	2.0	2.0	1.0	....	....
Total	....	4.5%	7.5%	4.5%	7.5%	4.5%	7.5%	4.5%	....	....
Direct overhead on installation costs:										
Superintendence	....	2.0%		3.0%		2.0%		....	2.0%	....
Loss and use of tools	....	1.0		2.0		1.0		....	1.0	....
Timekeeping and checking in field	....	1.0		2.0		1.0		....	1.0	....
Public liability and property damage insurance	....	1.0		2.0		1.0		....	1.0	....
Incidentals and contingencies	....	1.0		3.5		1.0		....	1.0	....
Contractor's bond and bond premium	....	....		1.5		....		....	....	....
Total	....	6.0%		14.0%		6.0%		....	6.0%	....
Contractor's profit	....	....		10.0%		....		....	....	....

							10.0%

Direct overhead on structures:							
Small tools and supplies plant rentals, repairs and cleaning	3.0%						3.0%
Permits and fire bond	1.0						1.0
Contractor's overhead and superintendence	8.0						8.0
Contractor's profit	10.0						10.0
Total	22.0%						22.0%
Direct overhead on paving:							
Superintendence			.5%	.5%			
Handling and checking			1.0	1.0			
Incidentals and contingencies			4.0	4.0			
Contractor's bond			1.5	1.5			
Total			7.0%	7.0%			
Contractor's profit			10.0%	10.0%			

Accounts to which no direct overheads are added:

Acct. 228—land
" 245—other general land.
" 249—general office equipment.
" 251—general shop equipment.
" 256—general tools and implements.
" 253—general garage equipment.

[fol. 2521] Subject: Going Concern Value—Ohio Fuel Gas Co.

F. H. Lerch, Jr.

2306

[fol. 2522] F. H. LERCH, recalled as a witness for cross-examination, continued his testimony as follows:

Cross-examined by Mr. Butler:

Q. Mr. Lerch, I have been advised that in the United case before the Commission you testified first May 7th, 1929, having been recalled several times, and that your final testimony in that case before the Commission was March 13, 1930; is that right?

A. I believe so, if that is your information.

Q. That is what they advise me.

A. All right.

Q. You thought last night that you had not been unwise enough—those are my words—to put dry holes into going value. I want to read to you what I assume is correct from

2307

[fol. 2523] your testimony of May 7th, 1929. You were being examined by your own attorney.

"Question: You said the dry holes drilled by this company were an element of value of its plant. Did you take into account the fact that dry holes are paid for out of operating expenses?" I should say you were cross examined by Mr. Scott. I can see that I am in error right away. But, going ahead:

"Answer: I have not included in the valuation anything for the cost of dry holes, and I am basing an element of value upon the knowledge obtained from the drilling of dry holes.

"Question. You included that as part of the going value?"

"Answer: Yes, sir."

Is that correct?

A. I do not think that is contradictory of what I said yesterday, because yesterday you were questioning me about the amount of going concern value that had been included in this case, and I said that, as far as I could tell

from reading Mr. Wheeler's Exhibit or in discussion that I might have had with him, there was no reference made to that particular element. Now, I might not have chosen my language as carefully as I should, but I think that is right. Now, if I am fixing myself a going concern value or discussing a going concern value, as we did in the United Fuel case, I assmed or used a straight ten per cent as my estimate of going concern value, and I used that, taking into account all of the factors which we could not properly invaluate by some mathematical conclusion. If I were fixing going concern value in this case on a straight estimate basis, as I did, or testifying to the presence of going concern value in the United Fuel Gas, I would consider that a

2308

[fol. 2524] reasonable factor to have in mind in fixing a percentage.

Q. You would want to know how many dry holes?

A. I would want to know what the effect of dry holes drilling was in the development of the property, yes, sir.

By Chairman Geiger:

Q. Now, wait a minute. What do you mean by the effect of dry hole drilling on the development of the property?

A. Dry hole drilling has the effect of delineating the producing areas in which gas is found. It has the effect of permitting the company to abandon property that is clearly wildcat or has proven non-productive property, so that they do not have the expense of carrying it any more. It gives you an idea of any particular condition existing within the area in which gas is being produced, and all of those things are of tremendous importance to the operating officials of the company.

Q. You mean they are the pioneer explorations which develop the lack of gas in the strata below a particular territory?

A. They do that.

Q. That leads you to abandon that territory or the wells in that territory?

A. That is one of the principle reasons.

Q. Or at least it assists you in your judgment?

A. Yes, sir.

Q. Now, one more question as to practical gas drilling: Can you tell when you have struck a dry hole how far away

that would determine the character of the land or of the producing sand?

A. No, you couldn't tell that.

Q. That is, you might have a dry hole at one place, and within a hundred yards of it you might have a producer?

A. That is possible.

2309

[fol. 2525] Q. Then how and what effect would it have in aiding you in the development of your territory when it does not have a great deal of effect upon your judgment as to the productive sands that may lie below a new point where you wish to sink a new well?

A. It does have a very strong effect on your judgment, but it does not tell you where you could drill a well inside a producing area, we will say, at which you could get a producing well. But it does tell you, you cannot go beyond that point very well and get a gas well. Now, they are prospecting for gas all over the country Take any well defined gas field. Take the Monroe field. I will assume that for example because it is the field I am most familiar with in the past two or three years. We have an almost exact proven area, proven by dry holes. Now, everybody is trying to find gas further away from that proven area, say five miles away or six miles away. They are trying to see whether they can go deeper. These dry holes outside of the proven area show the sub-surface situation and give an idea whether they will have to go 4,000 feet or 6,000 feet to get the same strata that they get in the producing wells, and that is going away from them in the dry holes. We know we are not going to buy territory or carry territory outside of that producing and proven area.

Q. I see. I have your idea.

A. That is my reason for saying dry holes are of such real importance to the company. A producing well is, of course, more important, but a dry hole has a very marked value.

By Mr. Butler:

Q. When you are getting no dry holes you almost hope for one, don't you, so that you can gain some knowl-

2310

[fol. 2526] edge?

A. No, sir, we would rather gain our knowledge by production.

Q. I assume that you recognize that all proper accounting and all commissions place dry hole expense in current operating charges?

A. That is not quite my understanding. I believe that they permit the company either to charge off their dry holes drilling in the year in which it is done or to amortize it over a period of years, so much per year and charge to that account to amortize the dry hole expenses for that year.

Q. What did the United do?

A. I think the United had charged it off.

Q. Yes, and so does the Ohio Fuel Gas, does it not?

A. Well, I will have to check it. I think you are right.

Q. And yet, notwithstanding that those are charged off and have been charged off and are being charged off, you get some value out of a dusty hole and carry it into your rate base, would you?

A. I certainly would.

By Chairman Geiger:

Q. You take this general view, as I understand it, that every failure one makes in trying to develop some matter, no matter what it may be, is of value in leading to ultimate success. You might apply it to any occupation. A lawyer might get some value out of losing a case, because it enables him to judge what he may do in the next case to win it. A physician might make an error in diagnosing a case and miss it in that case, but that helps him in some other?

A. Yes, sir.

Q. In other words, generally, you say an energy put forward in endeavoring to reach a successful conclusion which in itself is not successful, is of value as you add to your

2311

[fol. 2527] experience, and it enables you the better to reach your ultimate success? That is generally so?

A. I think that is almost automatic. I do not think anybody would contest that. I think here we have an application of that. I tried to give my reasons for feeling that way.

Mr. Turner: Would you permit a question or suggestion?

Mr. Butler: Why sure, Mr. Turner.

Mr. Turner: The fact that a bank charges off its fixtures or its building or both does not destroy the value of the building or fixtures, does it?

The Witness: I would say not, no, sir.

Mr. Butler: But suppose that the bank, in addition to its legal interest, had been making me pay for those fixtures?

Mr. Turner: You pay interest.

The Witness: As long as they belonged to the bank, or as long as they belonged to you, if you were buying those fixtures from the bank, in that manner you claim a value for them and the bank claims a value for them. The value is not destroyed, in other words.

Q. That is interesting, and it brings me to this. Does this question and answer reflect your basic conception of going concern value;

Q. As I understand what you mean by going concern value is what the plant would sell for in an open market over and above what it would actually cost for the materials in it?

Answer: That is right. That is the principal definition.

Mr. Turner: Is that from the United case?

The Witness: Yes, that is the principal definition that I know of that is most broadly recognized as the definition

2312

[fol. 2528] of going concern value.

2339

[fol. 2529] Q. Therefore, so far as the rate base is concerned, when you speak of intangibles you speak of that thing or those things combined which produce what we call going concern value?

A. That is the principal intangible value I would say in a rate case or in a valuation of a public utility property.

2340

[fol. 2530] Q. I am talking about a rate case now, so that we understand each other.

A. Yes, that is what I mean, in a valuation used for rate making purposes, that would be my idea of the intangible values.

Q. In other words, when I consider what you have done in this case and when I consider your treatment of intangibles, I may assume that all of the intangibles that you think ought to go into a rate base have been gathered up in this going concern value?

A. I think so, yes. I do not want the record to stand just exactly like that, Mr. Butler. I would say under ordinary circumstance- in some particular rate case, and I am not saying that that one exists here, it might be different; there might be some other element of value that I cannot now define.

Q. But as used in this case, and this is particularly applicable to this case, *and this is particularly applicable to this case*——

A. Yes.

Q. As used in this case intangibles mean going concern value?

A. Yes.

Q. I realize, and that is why I have asked the question, that there is a loose use of the term. Sometimes very good experts will make it cover everything. Just so we understand it.

A. Yes.

Q. I see on Page 12 of the Company's Exhibit No. 45 you have used $12,000,000.00 as going concern value?

A. That is right.

Q. I think Mr. Wheeler's study developed more than fifteen million?

A. That is my recollection.

Q. Has his study made subsequent to the use of this 2341 [fol. 2531] amount or were you generous with us?

A. No, sir. I think Mr. Wheeler, as part of his study, gave us an allocation of that between the city gate property and the distribution system property, and we have included here only that part which he said applied to city gate property.

Q. The $15,140,000.00 applies to the whole business?

A. Applies to The Ohio Fuel Gas Company as a whole.

Q. Including distribution?

A. Yes, sir.

Q. Now your working capital, including material and supplies, is $3,700,000.00, and your general overhead charges are $16,845,893.00; in other words, your general overhead charges, your working capital and going concern, amount there to $32,000,000.00 plus?

A. That is about right, yes, sir.

[fol. 2532] Subject: Gas Well Depreciation—Ohio Fuel Gas Co.

[fol. 2533] PETER ATONELLI:

2004

[fol. 2534] Q. How do you appraise a gas well?

A. We appraise a gas well—do you mean find the estimated cost of production new; is that what you have in mind?

Q. Well you have appraised gas wells, haven't you, through many gas fields?

A. Yes, sir.

Q. Now, what is your formula?

A. We went to the company records and from the company records we made an inventory of the casing and tubing in the wells. From the well longs, another record in the office files, we prepared a statement showing the depth of each well, the actual depth of each well. Of course, the inventory was subjected to all kinds of check. Then the wells were segregated into two accounts; one is well construction cost and the other is the well equipment. The well equipment, which consisted of casing and tubing, was priced by obtaining from the National Tube Company prices as of December 31st, 1929. These prices were checked against the Company's recent purchases to see if the Company is paying the same prices. The well construction cost was based on an analysis of 365 wells and these wells represent the number of wells that have been drilled by the Ohio Fuel Gas Company during the year of 1929. From this analysis we were able to determine the cost per foot for the construction cost of the wells.

Q. In other words, the equipment cost plus construction cost equalled the present reproduction cost?

A. Yes, sir. They are separate, in one account, under Account 211, which is the well construction account, and 212, which is the well equipment account.

2005

[fol. 2535] Q. How do you depreciate a well?

A. The wells are depreciated by going out in the field and examining the physical deterioration of the casing and tubing of wells that has been recently abandoned. We made a physical examination of the wells and determine the physical deterioration.

Q. Does depletion of a well, the life of a well, have anything to do with its present value?

A. No, we have not considered depletion at all. We have treated the well account on the same basis as pipe lines.

Q. Do you anywhere in your computation fix an average life for those wells?

A. For the physical condition of the wells, do you have in mind?

Q. No, the end of the well, the depletion of the well, the life of the well, the life of it as a producing well?

A. No, sir.

Q. They did not enter at all——

A. No, sir; we state that in our summary volume, that we did not make any valuation of the gas wells or the leaseholds.

Q. Well, I am talking about a well now?

A. Well, the depletion of a well has something to do with the gas in the ground.

Q. Well, I guess that is probably right. Any way, you have made no study here in Ohio in reference to the life of the gas wells?

A. We attempted to make such a study, but we were requested by the Company not to do it because we were asked to make a physical examination of the property and not to examine or make a study of the amount of gas in the ground.

Q. Well, isn't the value of a well dependent upon its

2006

[fol. 2536] life?

A. Not in accordance with the reproduction cost new, the theory that we used here.

Q. Well, it would seem that in the beginning then you had a little different idea and yielded to the Company's directions rather than to your own original intention; am I right or wrong?

A. I don't know how to answer that question.

Q. Well, you say you started to make a study; I hope I caught you correctly; but that you stopped it because you were requested by the company not to make it; am I quoting you rightly?

A. Well, that study might have been used for some other purpose.

Q. Oh, no; answer my question, Mr. Antonelli.

A. Would you repeat that question, please?

(Question read.)

A. Well, I suppose that the company did not think it was necessary to go to the expense.

Q. Oh no, no, no, you are a trained engineer, Mr. Antonelli; won't you listen to the question? I know there are some difficulties of language and I want to make allowance for that. I am not over-critical, but I want to get what you stated so that you and I will never differ. Now, read the last question again.

(Last question read.)

A. We stopped.

Q. Oh, now——

A. Well, I am going to answer.

Q. Explain it afterwards. I have asked you the simplest question that one man can ask another.

A. I still do not understand.

Mr. Turner: Do you understand the word "quote"?

2007

[fol. 2537] The Witness: Yes, sir.

Mr. Turner: Well, he wants to know whether or not he quoted you correctly; that is all.

The Witness: Well——

Commissioner Geiger: Do you understand the question?

The Witness: Yes, sir, I do.

Commissioner Geiger: Well, can you answer it?

The Witness: Well, the reason that we stopped—giving the reason why we stopped——

Chairman Geiger: That is not the question; the question is whether you first had in mind a different way of arriving at the value of a well from that that you finally adopted?

Mr. Turner: Oh, no, that is not the question at all.

Commissioner Geiger: That is my understanding of the question.

Mr. Turner: That is not the question, so we are all mixed up. The question is whether or not Mr. Butler quoted the witness correctly; that is all he wanted.

Commissioner Geiger: Oh, well, I am stepping back of the quotation; make it short and snappy, Mr. Butler.

The Witness: Yes, sir.

Q. What do you say, that I quoted you correctly?
A. Yes, sir.

2016

[fol. 2538] Q. Very good. I think you said that you assisted in the recent or present East Ohio and Hope inventory and appraisement. I think that was as of December 31, 1929, the same fixed date as this. How did you depreciate gas wells there?

A. In those valuations I did not work on the gas wells at all. I worked on the pipe lines, meters, services, distribution lines, not on the gas wells.

Q. You don't know how they were depreciated?
A. I know how they were depreciated.
Q. How were they depreciated?

Mr. Turner: I object. Ford, Bacon & Davis have offered no depreciation on gas wells in this case. We have offered no depreciation on gas wells by Ford, Bacon & Davis, and this witness has so testified.

Chairman Geiger: Objection overruled.
Mr. Turner: Note our exception.
The Witness: Shall I answer?
Mr. Turner: Yes, you should answer.

The Witness: The material in the gas wells was determined on the basis of the physical deterioration of the casing and tubing. That is my understanding. The con-

2017

[fol. 2539] struction cost was determined on the basis of the amount of gas, the remaining life of the gas in the ground. In other words, we used the depletion method.

Q. That is what you used in the United, in this case that is pending in West Virginia, the depletion method, wasn't it?

A. We did in the case of the construction cost, yes, sir.

Q. Yes, and that is what you started to do in this case: that is what you begun your study for, wasn't it?

A. No, in this case we had specific information not to value the gas lands and the leaseholds.

Q. Who gave you that specific information? I suppose you mean direction?

A. Yes, sir, direction. I beg your pardon.
Q. Who told you that?
A. Our client, the Ohio Fuel.
Q. I know, but what individual?

A. I got my instructions from our office. I don't know.
Q. Who from your office told you that?
A. Let me see. Our Vice President, Mr. Towers.

Mr. Butler: All right. Bring Towers, and then we will find out. You may smile all you please.
Mr. Turner: Well, I just am not going to bring Mr. Towers to examine into that.
Mr. Butler: Of course, you won't. You thought you would escape this.
Mr. Turner: Oh, no.

Q. You say you started—you said this morning you started to make this study?
A. Yes, we did.
Q. Who? Who started? You?
A. Under my direction, yes, sir.
Q. What were you doing? What was the——

2018

[fol. 2540] A. We were getting the initial and final pressures for each individual well, active well, for each individual active well.
Q. Were you out here when you were notified not to use that method?
A. I could not recall. I have been out here and out there so many times that I couldn't say offhand.
Q. Well, this is not very offhand. Did you get it by word of mouth, by letter, by telegram, by telephone? That is all I can think of for the moment?
A. Yes. Well, I believe I got it by telephone and also by written instructions.
Q. Now, produce your written instruction please. Let us have that?
A. I haven't *for* it here.
Q. Well, get it. I assumed you did not have it here?
A. Yes.
Q. Then we will find out about it. Now, as a matter of fact you thought the depletion method was the correct method, didn't you?
A. No, I did not.
Q. You think that is the correct method?
A. Under the circumstances yes, I do.
Q. You mean under the circumstances of getting a positive order from the home office?

A. No. We were asked to make a physical examination—I mean to estimate the physical condition of all properties of the Ohio Fuel production and transmission system in accordance with the reproduction cost new method, and not to put a value on the gas lands or leaseholds, and that is what we did.

Q. When did you do that work? I think you said September or October or November of '29?

A. No; it took more than that. I couldn't say now. We worked on this valuation practically one year.

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[fol. 2541] Q. One year?

A. Yes, sir, it is a very big job.

Q. Well, you were working on this while you were working on the United?

A. No, the United was completed before that date.

Q. So this followed the United?

A. The 1928 valuation of the United Fuel Gas Company, yes, sir.

Q. And you have been working on the East Ohio and Hope while you have been working on this?

A. No.

Q. That followed this?

A. I couldn't recall now.

Q. Can't you try to remember?

A. I don't know that both were done at the same time, that is, valued at the same time. I don't know.

Q. Don't you remember now whether you worked at the same time on this and on the East Ohio and Hope, or whether you did this largely first and then followed with East Ohio and Hope?

A. I believe both of those jobs were done simultaneously.

Q. Yes, and in the one you used the depletion method and in the other you used this?

Mr. Turner: I object. There is no method of depreciation used here for gas wells except the construction inventory.

Commissioner Bricker: Objection overruled. If he knows the answer, let him state.

Mr. Turner: There is no method used here.

Commissioner Bricker: They claim there is something.

Mr. Turner: That is what we are trying to get at.

Chairman Geiger: Aren't there other witnesses?

Mr. Turner: Yes, but this is part of the valuation—just as there have been other witnesses on other aspects.

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[fol. 2542] Chairman Geiger: There are other witnesses of Ford, Bacon & Davis who give the value of the gas leases.

Mr. Turner: No, sir. Now, that is what I have been trying to make clear, that Ford, Bacon & Davis have nothing to do with this. Am I wrong on that?

The Witness: You are correct.

Chairman Geiger: You introduced your record of the gas case in West Virginia.

Mr. Turner: Yes, sir.

Chairman Geiger: Was the method of depletion used there?

Mr. Turner: I don't know. All I introduced of West Virginia was the finding of the Commission in West Virginia.

Chairman Geiger: Not the testimony as to how they arrived it.

Mr. Turner: No, sir.

Mr. Butler: Here is an expert, a representative of a great engineering corporation.

Mr. Turner: Yes, and you have a right to cross examine him on any thing they did in this case, any figures they produced in this case, any theory that they advanced in this case.

Chairman Geiger: Don't you think, Mr. Turner, using the ordinary rules as to cross-examining, a witness who theoretically has been offered as an expert, although he has not so claimed on the stand and is now under cross-examination, he may develop what his general knowledge and ability and so forth is with reference to things concerning which he has testified?

Mr. Turner: You may develop that for the purpose of establishing his experience and qualifications, but not to be used for other purposes. What they want it here for is

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[fol. 2543] to dispute something that has not been presented. We have produced——

Chairman Geiger: Let me ask you this question and see if I am right or not. Do I understand you in trying to develop the value of your property used and useful have not in any place used testimony as to the value of gas leases?

Mr. Turner: We have not introduced that evidence by Ford, Bacon & Davis.

Chairman Geiger: You have, however, introduced it?

Mr. Turner: I don't know whether counsel on the other side will admit it. I claim we have for the purposes of this case introduced it. They claim that I have not.

Chairman Geiger: Overruled.

Mr. Turner: Note an exception.

(Question read.)

Mr. Turner: Now, we have the right to know which one is the other and which one is this.

Commissioner Bricker: All right.

Chairman Geiger: You object to the question as indefinite?

Mr. Turner: Yes, sir.

Mr. Butler: I am always glad to re-inform the learned counsel. The other could mean only the East Ohio and the Hope, and this could be only the Ohio Fuel.

Mr. Turner: I never would have guessed that one. I thought you were talking about the United.

The Witness: You will have to give me a definite company.

Mr. Butler: All right. I will do that. I wish you would listen this time. I am referring to the Eastern Ohio and the Hope on the one hand and the Ohio Fuel Gas on the other.

The Witness: Well, the Hope and the East Ohio, as I

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[fol. 2544] understand it, the wells were not deteriorated on the same basis. I don't know what was done in the Hope.

Mr. Butler: I guess I will have to call for an explanation of that. Read it will you, Mr. Walcutt?

(Answer read.)

Q. Well, the East Ohio you do know?

A. On the East Ohio the well construction cost was determined—I mean the deterioration of the well construction cost was determined on the depletion method.

Q. And that amounted to about 50 per cent. depreciation, didn't it?

A. Something like it. I don't know the exact figures.

Q. What depreciation do you have here?

A. The average depreciation on that well construction cost? We have found the average physical deterioration on the well accounts, both account 211 and 212, to be about 80 per cent. condition.

Q. I am asking about the comparable well construction cost, the thing you talked about a moment ago in respect to East Ohio, where you said there was about 50 per cent. depreciation. Now, give me, the comparable thing here.

A. The comparable condition here will be 80 per cent.

Q. 20 per cent. depreciation?

A. 20 per cent. depreciation is correct.

By Chairman Geiger:

Q. Now, of that 20 per cent. of depreciation, as I understand it, none is attributable to depletion of the well?

A. No, sir, Your Honor. We made a physical examination of the material in the well.

Q. I see.

A. Only.

Q. Suppose the well in which the material had been placed had gone out and was no longer producing gas, 2023

[fol. 2545] where would you put it?

A. If your well is not producing gas, it won't be in our valuation, if it is not a used and useful well.

Q. Suppose it is producing 25 per cent. of the gas it produced at the time it was first taken in, then what do you do about it?

A. Well, we have taken all wells that are active in our valuation, and I have not examined individual wells.

Q. Mr. Antonelli, Ford, Bacon & Davis are very able engineers, aren't they?

A. They are considered so.

Q. And do you believe them to be so?

A. Of course, I do.

Q. Well, just why here in Ohio, as you say, at the same time, did this great firm of engineers use different methods for depreciation of well construction?

A. Well, the only reason that I could give is because we were following strictly reproduction cost new method, just to find, to estimate, the physical condition of the property.

Q. Why didn't you follow it in the other case? I want to know why you——

A. I couldn't answer why we didn't follow it in the other case, because I don't know. But this is the proper method to use.

Q. This is now the proper method?

A. Yes, sir.

Q. And you think you are not using the proper method in the other case?

A. Under the circumstances I believe we are.

Q. What are then the peculiar circumstances that make the other the proper method

A. Well, I believe they had taken into consideration there the leaseholds and the gas lands; we are not making a valuation of the gas lands here.

Q. What has that got to do with the depreciation of the production cost—well construction cost?

A. We couldn't mix depletion with depreciation. Here

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[fol. 2546] we are trying to find out the physical deterioration of the wells.

Q. Down in the United you used the depletion method for depreciating your well construction cost, didn't you?

A. Yes, we did.

Q. Were you wrong there?

A. I believe out there they submitted at the same time a valuation on the gas lands. I am not sure about that.

Q. Well, of course, you are not going to have a valuation of gas lands here, too; if you will just forget the gas lands and let somebody else take care of that——

Mr. Turner: We object to that instruction of the witness, because it is not proper.

Mr. Butler: Mr. Antonelli will not follow my instructions anway. He is too able a witness to do that. And if you need to have me instruct him, I will tell him to just go ahead and pay no attention to what I say.

The Witness: Well, I might repeat my reasons again, that we have followed here the reproduction cost new theory. That is one reason. And the second reason is we did not make any valuation of the gas lands.

Q. Did you find out that your depreciation in Ohio and United was leading you to about 50 per cent. depreciation, whereas this method leads you to about 20 per cent. depreciation? Is that one of the reasons, Mr. Antonelli?

A. No.

Q. That did not enter into it?

A. No, not at all.

Q. Why then, did you start in this case on the depre-tion method and start on your studies if you did not think it was right? Tell the Commission that.

A. I believe we stopped because we found out we were not going to put any value on the gas lands. I don't know

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[fol. 2547] personally. You will have to ask somebody else.

Mr. Butler: Then I will, if they come here. I am not criticising on that.

Mr. Turner: You might call me on that. I might have had something to do with it.

Mr. Butler: I rather think that you and your associates did. I think you found that you did not want 50 per cent. depreciation.

Mr. Turner: No, I think I found what I thought the law was, and we will fight it out with you any time you want to.

Mr. Butler: When you get that letter of instructions in I think it will go a long ways toward clearing it all up, and I think there is no need of our going further then on that until we do get it.

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[fol. 2548] And also—

P. Antonelli, recalled for further cross-examination, having been heretofore duly sworn, testified as follows:

Cross-examined by Mr. Butler:

Q. Mr. Antonelli, Mr. Turner tells me you have returned with some things; have you the letter directing you in respect to the appraisement of the gas wells?

A. I made an attempt to find the letter but I must have been mistaken as to having written instructions from Mr. Towers. I recall that I was in Charleston and he called me up from New York to come back and to this work and I thought he wrote me. I will make a further investigation. However, when I went back to New York, Mr. Leroy was there and Mr. Towers, and I took some notes, from Mr. Lerch as to what to do, and I found among my papers that sheet of paper that I had taken notes on, and I had so many

instructions at that time, you know I could not—I might have—I will make an attempt to find it, but so far I have been unable to find anything in regard to the instruction on the depreciation of gas wells. I might read to you my instructions from Mr. Leroy if you wish it.

Q. Yes, all right, we will hear it.

A. He told me first to make a study of the observations of available casing and tubing and that has been used under all conditions. That is No. 1.

2. To make a study of the cost of maintenance of the Company's wells.

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[fol. 2549] 3. Determine the number of wells completely cased and the average open flow.

4. Obtain opinion of Fuel Men as to the condition of the wells.

And this was my basic information, and from here on the men worked in the field to get all the information that we needed to condition the wells.

Q. Yes, but, Mr. Antonelli, I was inquiring about the direction to you to suspend your depletion study and pursue the method that you did pursue. That is what I am inquiring about. I am not interested for the moment in what anybody else might have told you except this particular thing. You have told us that you started to make the depletion study in this particular matter and that you stopped it because the company directed otherwise. Now I tried to find out how the company had advised you and if I understood you, you finally concluded that your superiors had conveyed the Company's information?

A. Yes, sir, that is correct.

Q. Well, now, who conveyed it to you?

A. Well, Mr. Towers, who is the vice president and general manager of the valuation and report department, under which department I belong. Mr. Lerch, who was in charge of the valuation, I believe, and Mr. Van Poole, of the company, was present at the time.

Q. Well, where did they give you that direction?

A. Well, I received directions several times during a week; the first direction I received over the telephone while I was out in Charleston.

Q. From whom?

A. From Mr. Towers.

Q. And what did he say to you?

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[fol. 2550] A. Well, he said that Ford, Bacon & Davis had decided to use the depreciation method of determining the condition of Account 211 and 212, which are the well accounts.

Q. Well, then he did not tell you that the Company had directed the change—or did he?

A. Well, not over the telephone, I don't think so, no.

Q. Well, when did he tell you that, if ever?

A. Well, I have certain correspondence that stated that the Company has directed Ford, Bacon & Davis that they should make a physical examination of the wells and limit ourselves only to the physical property of the wells and not to the gas lands.

Q. I shall be very happy to see those letters.

A. Yes, I will do my best to get them.

[fol. 2551] F. H. Lerch, Jr.:

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[fol. 2552] By Mr. Butler:

Q. Mr. Lerch, when you were examined on May 7th, 1929, in respect to the depreciation of gas wells, I am advised that these questions and answers were made and given. There may be some slight errors, due to transmission, but let me read them.

"Question: Now, in that way you get the value of the wells new. How did you ascertain what the present value of the wells was, the depreciated value?

"Answer: Well, we have been talking only about the one account, the gas well construction account. The cost of drilling wells we have assumed in this report the same as in the previous report and the same as we have done in practically all cases of valuing natural gas properties, that the gas well construction account was in the same deterio-

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[fol. 2553] rated or depleted condition as the remaining rock pressure average for the wells represented by the original rock pressure; in other words, we tabulated the rock pressure of the present wells and averaged the present

rock pressure, and compared that with the original rock pressure of these identical wells, and found the wells had a remaining rock pressure of 46 per cent., and we have deducted therefore 54 per cent. of the new value as representing the amount of deterioration in the gas well construction account.

"Question: Then what you have appraised the present value is only 46 per cent.?

"Answer: We have included that amount under the heading of deteriorated cost.

"Question: Do you consider that the fair actual value for the wells as they are?

"Answer: I think it is, yes, sir.

"Question: You have spoken of the gas well construction account. What do you mean by that?

"Answer: Well, the valuation was set up to follow the uniform classification of accounts and the gas well construction account separates the drilling and other expenses incidental to that cost into the gas well construction cost and puts into another account the other items.

"Question: And in valuing both of these accounts, you did it the same way?

"A. We did not deteriorate the gas well material account in the same way we did the gas well construction account.

"Question: How did you arrive at that?

"A. We considered the condition of the gas well equipment, the casing and tubing and other appurtenances, closing-in equipment, and so forth, as in the condition which in-

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[fol. 2554] vestigation has found this equipment was in when the well was abandoned. We have gone on the basis that of the amount of equipment in the well at the time of its abandonment, the company could recover approximately 85 per cent. of the equipment, and that the recovered material would be in about 80 per cent. condition, and we consequently gave the condition of 85 and 80, or 68 per cent.

"Question: You did that upon the theory that material could be used to the extent of 68 per cent. of its value after the wells were abandoned in the drilling of other wells?

"Answer: No, not as drilling other wells, but in lines or for some other purposes."

Now, that fairly gives your position there?

A. I think you have read my testimony. There might be a word or two in there, but it does not change the thought.

Q. It is only fair, before I proceed to something else, to ask you if there is anything you want to say in respect to that. You probably said all yesterday that was necessary?

A. I think so. I haven't anything further.

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[fol. 2555] Q. Drilling an offset on the other man's lease will reduce the rock pressure?

A. Yes, sir.

Q. And that automatically, under the system you used in the United Fuel, depreciates the value of all the equipment of that well?

A. The result of using the system in the United depreciates the United Fuel property to the extent that the field itself is depreciated by either their own or contemporaneous production.

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[fol. 2556] Q. Even though the well came in today and some fellows' offset well came in a month from now, you would depreciate that well by the drop in the rock pressure under your other system used in the United Fuel, wouldn't you?

A. Yes, sir.

Q. Every time you make an income tax return for your producing wells, you do make an estimate of the depletion of the well, which is recognized by the government in a credit given to you in the value of your property on account of its depletion which has occurred during that year; don't they allow that in gas wells, mines, copper mines and everything that has a natural tendency to reduce the material if it is being operated.

Mr. Turner: Wasting assets, the Commissioner has in mind.

Chairman Geiger: Yes.

A. The allowance is, of course, not exactly that. They give you more or less a fixed allowance which you elect to take, and you give them all the dope that you have got and you talk to them and their geologist, who is supposed to have the object in view of fixing something that

is fair to you, and they put their own estimate or value upon the information available.

Q. Answer this, and it won't take so long; isn't it a fact that every year a gas company which owns gas wells, in making its returns to the Treasury Department for the purposes of taxation and the income tax, does take into account depletion that has occurred during that year in its property?

A. Yes, sir, in some form or other they make an allowance for depletion of wasting assets.

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[fol. 2557] Q. Then it *was* has been found in tax cases and might be found in this case?

Mr. Turner: May I ask a question, Your Honor?

Chairman Geiger: Yes, sure.

By Mr. Turner:

Q. Isn't the measure fixed by the government itself, the measure of depletion?

A. Yes, sir.

Q. And isn't the formula of depletion the formula prescribed by the Treasury Department?

A. Yes.

Q. From which you may not depart; is that correct?

A. Yes, sir.

By Chairman Geiger:

Q. Well, could you apply your formula for the purposes of ascertaining the value of your property after a given number of years of depletion?

A. No, sir.

Q. It would not work?

A. No, sir.

Chairman Geiger: All right.

By Mr. Butler:

Q. Well, this depletion by the government has for its basis declining rock pressure, hasn't it?

A. Just exactly what it is I don't know. I know that you can take your one basis, which is practically based on

decline in rock presure—you can take a fixed allowance, but you are limited as to how much you can take. Now, nothing that Judge Geiger has asked to be compiled, or if it could be compiled, has any bearing on that point.

Q. In your judgment?

A. In my judgment.

Q. Well, you built up your inventory and appraisal in the United case around rock pressure and the depletion or decrease of rock pressure; now, when did you discover that you were wrong about that? When were you really educated? That interests me greatly.

A. I don't remember; I imagine it was some time last

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[fol. 2558] fall or last summer that we decided to make this change. I don't know just what you mean by saying that I was educated. The use of that term doesn't mean very much to me. But we decided to make that change, I think it was last fall some time.

By Chairman Geiger:

Q. Was it before or after you had testified in the case?

A. It was after I had testified in that case. The last testimony there was in March, 1930.

[fol. 2559] THOMAS R. WEYMOUTH:

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[fol. 2560] Q. Do you believe in a depreciation for gas wells?

A. I wish you would make that clear to me, just what you mean.

Q. Yes, I think you are quite right. Do you believe in an allowance for depreciation, an allowance in the operating——

A. An annual amount taken from the revenues to set up a depreciation reserve? Is that what you mean?

Q. Yes, decidedly.

A. That is quite essential in order to accumulate the amount of money which would be necessary to replace or pay back the cost of that well at the time when the well expires by absolescence.

Q. How do you work that out?

A. In practice that is usually a more or less arbitrary charge made by the accounting officers of the company, which is intended to reflect, as nearly as possible, their estimate of the amount of money which will accumulate and be on hand from year to year to replace the various items of property, including wells and well construction, as they expire, from year to year. As I say, it is a more or less

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[fol. 2561] arbitrary charge made by the accounting department.

Q. I suppose there is some reason and some method back of it?

A. Yes, they attempt to have it be of such magnitude as to reach the proper value as I have tried to testify. Sometimes they are not able to do it, because of insufficiency of earnings, that is, they are not able to allocate as much of the revenue to that item as they should. There are various ways of estimating it, if that is what you want.

Q. I am talking about what they ought to set aside if funds are available. Now, I want to know whether that is the case?

A. There are various ways of determining that, of estimating it.

Q. What is your way of determining the amount that should be set aside?

A. I haven't got any particular way.

Q. It varies with the locations?

A. It depends upon the conditions. Sometimes that is done by a flat percentage of the physical property according to the judgment of the officers. Sometimes it is done by a flat percentage of the gross revenues of the business. Sometimes it is done on a rock pressure basis, in which they estimate the depletion from the rock pressure readings made each year.

Q. Mr. Weymouth, suppose the Commission were to say to you, "Now, Mr. Weymouth, by Monday morning, bring to us your theory of fixing a proper amount for well depreciation in the Ohio Fuel system", what method would you choose to bring in Monday morning?

A. Mr. Butler, I have had that very problem before me for several years, and I have never been able to work out

a satisfactory solution, partially because I have not had the time to concentrate on it, and possibly because I might not
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[fol. 2562] be able to solve it if I had. But I haven't got an answer to that question yet.

Q. Isn't that due to the fact, Mr. Weymouth, that you are mentally unwilling to concede that gas wells grow old and die, and that they become less valuable because of that?

A. Not at all. I am not only not unwilling to concede it, but I state it is a positive fact, that gas wells do grow old and die, and it is necessary to lay aside this annual allowance to provide for the contingency. But that is an entirely different question from saying that their condition at any given date is thus and so. That is merely a question of accumulating a sufficient amount of money to replace them or pay their cost when they finally do expire from whatever cause.

Q. Mr. Weymouth, I assume you have carefully and systematically inquired into the history of the leases and wells in the various properties that now make up the Ohio Fuel Gas Company?

A. No, I have not done that in detail with this company, because there are other men who are devoting their attention to that, and my duties preclude the possibility of going into that detail.

Q. You know something of the length of time over which their history extends, or its history; you know the Ohio Fuel Gas took in the Logan, don't you?

A. Yes.

Q. You know the Logan had large acreage and wells?

A. Yes, but I am very hazy as to the details of the history of it.

Q. Even with your haziness I venture to ask you further, with your peculiar views, you would care to know anything about the history of the wells that go to make up this property and have made it up, about their experience, about
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[fol. 2563] their lives, when they die; if I understand you, you attach no importance to that item?

A. For what purpose? You do not complete your question. Of course, I want to know about them as much as I can, but for what purpose?

Q. What good would it do you if you knew all of that? What use would you make of that knowledge?

A. I am merely trying to get at what you are asking me. You say would I care to inquire into these things. But for what purpose? Of course, I want to know as much as I can about them.

Q. Would that affect in any way your idea of the value of the wells?

A. Undoubtedly it would be information which I would want to know in arriving at the value of the property, certainly, but you will have to be more specific in your questions so that I can answer you.

Q. Imagine that I represent a very rich syndicate and you are my engineer, and we want to buy all of these properties from Ohio Fuel Gas. Of course, I am depending upon you to give me some idea of the worth of the property. Would you want to know all about it?

A. Decidedly. I would commence the very first thing with complete history of the properties.

Q. And a history of each well?

A. If I could get it, yes.

Q. Why shouldn't you do that in a rate case?

A. I think you should.

[fol. 2564] LEON J. PEPPERBERG:

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[fol. 2565] Q. All right. Mr. Pepperberg, the other day I was asking you about the principles enunciated by Mr. Davis, and in the confusion, the thing that I particularly wanted I couldn't find. It is on Page 1630 of the testimony in that case and he was being cross-examined and these were the questions and answers, and I want to know whether you approve of his conclusions and answers.

"Question: Is there any connection between rock pressure and volume?

"A. Yes, sir.

"Question: Well, greater rock pressure doesn't always mean greater volume, does it?

"Answer. Not always.

"Question: Then there is no inevitable connection?

"Answer: There is an inevitable connection. When a well is new, and has high rock pressure, it has its highest

open flow. When it is old and has a low rock pressure, its open flow is low and there is a relation, they go down together and it is inevitable."

A. Yes.

[fol. 2566] COMPANY EXHIBIT No. 45

Line 1 on Page 23 to and including Line 5 on Page 26

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[fol. 2567] General Overhead Charges

General overhead charges on construction are classified as engineering and superintendence, administrative expense during construction, interest during construction, organization costs, legal expenses during construction, insurance and taxes during construction and the cost of financing. These overhead charges are unavoidable in the construction of a property and are as directly a part of the cost of the physical property as are materials and construction labor. The following tabulation shows the general construction overheads which have been estimated to apply in the construction of this property:

	Production system	Transmission system	General property
Engineering and superintendence during construction	2.5%	5.0%	1.0%
Administrative expenses during construction	2.0	2.0	2.0
Interest during construction	7.0	7.0	7.0
Organization cost	2.5	2.5	2.5
Law expenses, insurance and taxes during construction	1.5	1.5	1.5
Cost of financing	4.0	4.0	4.0
Total	19.5%	22.0%	18.0%

The above percentages do not include any allowance for going concern value or any elements entering therein.

Engineering work during construction may be conducted by a department organized for this purpose or by the em-

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ployment of an established engineering organization, the [fol. 2568] cost for comparable results being about the

same. Included in this expense are the cost of preparation of designs and specifications, the review of bids for construction, checking contractors' estimates, well location work, general supervision of construction, laying out of lines, and mapping the system. This expense would be incurred during the entire construction period extending over not less than two years.

The construction of a property of this size, involving a large expenditure of money in a period of two years' time, would require the organization of a comprehensive administrative force.

Interest during construction has been allowed at the rate of 7 per cent per annum. The money would be required on an expense basis for a period representing at least one-half of the construction period of two years. This rate of interest is taken as being the rate at this time at which such a large sum of money could be obtained.

Organization costs are those necessary for the development or promotion of the enterprise and include services and expense of organizers and promoters, preliminary surveys and reports charter expenses, legal and technical expenses pertaining to the advisability of the proposition, and the creation of the project as a corporate entity, all incurred prior to the starting of construction; the preparation of prospectuses, and interest on these expenditures during the pre-construction period.

Law expenses during construction include such items as fees and expenses of general counsel and local attorneys in the various localities in which the utility renders serv-

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[fol. 2569] ice. It includes office expense of such attorneys, the cost of printing briefs, legal forms, testimony, reports, establishment of rates, witness fees, notarial fees, registration fees and miscellaneous expenses.

Insurance and taxes during construction include fire insurance, public liability, damages in excess of liability insurance, property taxes, and construction bonds.

Cost of financing includes the expense involved in assembling the necessary capital for the enterprise and must not be confused with bond discount which has not been considered in the estimates. The expense is that which would be incurred in the floating of securities and as the interest rate provides for current market return upon the investment there is no discount to be considered.

In the matter of deterioration, some part of the general overheads would undoubtedly deteriorate in proportion to the deterioration in the physical property. For instance, while a great deal of the engineering and supervision done during construction would not be duplicated in making replacements, there is a certain amount which must be repeated every time a material change is made in the layout of the plant from any cause whatsoever. It is therefore estimated that deterioration will occur in the general overheads allowed for engineering at the rate of ½ of 1 per cent in the production system, 2 per cent in the transmission system, and 1 per cent in the general property.

As the replacement of property involves the expenditure of additional funds the interest charges are repeated, therefore interest during construction is considered to

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[fol. 2570] deteriorate in proportion as the physical property deteriorates.

No deterioration has been computed on the balance of the overhead construction costs, as it is considered that these costs once incurred would not again be necessary.

[fol. 2571] CITY EXHIBIT No. 74

Pp. 9, 11, 12, 14, 16, 17, 18

[fol. 2572] 9

Study of Accrued Depreciation and Average Age of the Gas Wells of the Ohio Fuel Gas Company Based on Decline in Rock Pressure

Field	Number of wells	Average age in years	Per cent depreciation	Average per cent depreciation per year
Eastern	917	7.06	57.77	8.18
Lancaster	487	8.78	53.56	6.10
Mt. Vernon	443	16.23	45.28	2.79
Northern	1677	8.45	63.91	7.56
Southern	515	8.79	56.64	6.44
Stewart	323	3.18	32.51	10.22
All districts	3662	8.75	58.1138	6.6416

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Ohio Fuel Gas Company

Estimated Annual Rate of Depreciation

Acct. No.	Title of account	Cost new	Per cent	Amount of depreciation
	Production system:			
204	Land	$20,514	0	$0.00
206	Rights of way	115,508	0	0.00
208	Gas well structures	343,382	2	6,867.64
210	Other production system structures	162,136	2	3,242.72
211	Gas well construction	14,192,077	6.6	936,677.08
212	Gas well equipment	9,715,175	6.6	641,201.55
213	Field line construction	774,475	2	15,489.50
214	Field line equipment	1,801,912	....	36,038.24
216	Drilling & cleaning equipment	545,401	10	54,540.10
217	Other production system equipment	5,612	2	112.24
	Total production system	$27,676,192		$1,694,169.07
	Transmission system:			
218	Land	$67,818	0	$0.00
220	Rights of way	1,797,299	0	0.00
221	Compressing station structures	1,089,999	2.5	27,249.98
222	Transmission system measuring sta. structures	129,629	2.5	3,240.73
223	Other transmission system structures	234,167	2.5	5,854.18
224	Compressing station equipment	6,294,007	2.6	163,644.18
225	Transmission system measuring station equipment	496,891	2.5	12,422.28
226	Transmission line equipment	40,541,891	2	810,837.82
227	Other transmission system property	168,708	2.5	4,217.70
	Total transmission system	$50,820,409		$1,027,466.87
	General property:			
244	General office land	$265,625	0	$0.00
245	Other general land	2,757	0	0.00
247	General office structures	284,045	2	5,680.90
248	Other general structures	81,595	2	1,631.90

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Acct. No.	Title of account	Cost new	Per cent	Amount of depreciation
249	General office equipment	156,681	5	7,834.05
251	General shop equipment	104,477	10	10,447.70
256	General tools & implements	367,339	25	91,834.75
253	General garage equipment	11,201	5	560.05
254	General laboratory equipment	173,529	5	8,676.45
255	General telephone & telegraph equipment			
	Total general property	$1,447,249		$126,665.80
	Total property	$79,943,850	3.6	$2,848,301.74

Ohio Fuel Gas Company

Fair Price for Gas Delivered by United Fuel Gas Company to Ohio Fuel Gas Company, Ravenswood, W. Va.

	West Virginia Commission			Ohio basis			Protestants basis		
Class:	Value	Allocation factor	Allocated value	Value	Allocation factor	Allocated value	Value	Allocation factor	Allocated value
Production	$15,146,352	21.6926	$3,285,638	14,758,024	21.6926	$3,201,399	$10,896,679	21.6926	$2,363,773
Transmission	17,793,598	15.8915	2,827,670	16,904,919	15.8915	2,686,445	11,015,574	15.8915	1,750,540
General	951,254	18.5589	176,542	932,218	18.5954	173,350	818,732	18.7763	153,728
Leaseholds	7,914,037	21.6926	1,716,760	1,400,600	21.6926	303,827	7,126,481	21.6926	1,545,906
Going value			527,946						
Working capital			309,000			200,000			309,000
Rate base			$8,843,556			$6,565,021			$6,122,947
Operating expenses:									
Gas purchased	$1,777,337	21.6926	$385,551	$1,777,337	21.6926	$385,551	$1,777,337	21.6926	$385,551
Leaseholds expense	1,068,742	21.6926	231,838	1,068,742	21.6926	231,838	1,068,742	21.6926	231,838
Other production expense	956,325	21.6926	207,452	956,325	21.6926	207,452	956,325	21.6926	207,452
Transmission expense	738,898	15.8915	117,422	738,898	15.8915	117,422	738,898	15.8915	117,422
State and local taxes	921,556	18.5589	171,031	921,556	18.5954	171,031	921,556	18.7763	173,034
Gas used by company	(51,886)	21.6926	(11,255)	(51,886)	21.6926	(11,255)	(51,887)	21.6926	(11,256)
Federal income tax	126,579	18.5589	23,492	126,579	10.0000	12,658	126,580	10.0000	12,658
General expense	604,886	20.1298	121,762	604,886	20.1298	121,762	779,497	20.1298	156,911
Engineering, etc							(215,756)	20.1298	(43,431)
Total			$1,247,293			$1,236,459			$1,230,179
Less gasoline earnings			122,052			122,052			122,052
Net operating expense			$1,125,241			$1,114,407			$1,108,127
Operating expense			$1,125,241			$1,114,407			$1,108,127
Amortization and depreciation 5.27%			466,055			286,341			254,023
Return			707,484		3.6% 6%	393,901		7%	428,606
Cost of service 11,458,860 M			$2,298,780			$1,744,649			$1,790,756
Cost per M			20.061 Cents.			15.225 Cents.			15.628 Cts.
Cost per M based on 6½% return						15.512 Cents.			
Cost per M based on 7% return						15.798 Cents.			

NOTE: ( ) Denotes red figures.

Ohio Fuel Gas Company

Determination of City Gate Rate for Natural Gas at Columbus, Ohio, Using Company's Reproduction Cost and Operating Expenses, Adjusted and Allocated to the Service of Columbus Based on a Net Return of 6, 6½ and 7 Per Cent

Account No.	Classification	Reproduction new	Less adjustments	Per cent condition	Value depreciated	Allocation factor	Allocated to Columbus
	Production system property:						
204	Land	$20,514	$20,514	100.	$20,514	16.8150	$3,449
206	Rights of way	115,508	115,508	100.	115,508	16.8150	19,423
208	Gas well structures	343,382	343,382	80.	274,706	16.8150	46,192
210	Other production system structures	162,136	162,136	86.	139,400	16.8150	23,440
211	Gas well construction	14,192,077	14,192,077	41.8874	5,944,694	16.8150	999,600
212	Gas well equipment	9,715,175	9,608,877	41.8874	4,024,909	16.8150	676,788
213	Field line construction	774,475	774,475	85.	658,304	16.8150	110,694
214	Field line equipment	1,801,912	1,637,031	85.	1,391,476	16.8150	233,977
216	Drilling and cleaning equipment	545,401	545,401	70.	381,781	16.8150	64,196
217	Other production system equipment	5,612	5,612	85.4	4,791	16.8150	806
	Total	$27,676,192	$27,405,013		$12,956,083		$2,178,565
	Incomplete construction	234,295					
	General overheads	5,442,032	3,833,830		1,958,267	16.8150	329,283
	Total production system property	$33,352,519	$31,238,843		$14,914,350		$2,507,848
	Transmission system property:						
218	Land	$67,818	$67,818	100.	$67,818	10.2782	$6,971
220	Rights of way	1,797,299	1,797,299	100.	1,797,299	10.2782	184,730
221	Compressor station structures	1,089,999	1,076,486	84.3	907,478	10.2782	93,272
222	Transmission system measuring station structures	129,629	129,629	80.	103,703	10.2782	10,659
223	Other transmission system structures	234,167	234,167	81.1	189,999	10.2782	19,529
224	Compressing station equipment	6,294,007	6,294,007	84.2	5,299,554	10.2782	544,699
225	Transmission system measuring station equipment	496,891	496,891	90.0	447,203	10.2782	45,964
226	Transmission line equipment	40,541,891	39,266,552	82.5	32,894,905	10.2782	3,329,613
227	Other transmission system property	168,708	168,708	85.1	143,627	10.2782	14,762
	Total	$50,820,409	$49,531,557		$41,351,586		$4,250,199
	General overheads	11,177,099	6,924,923		5,863,283		602,640
	Total transmission system property	$61,997,508	$56,456,480		$47,214,869		$4,852,839

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Ohio Fuel Gas Company

Determination of City Gate Rate for Natural Gas at Columbus, Ohio, Using Company's Reproduction Cost and Operating Expenses, Adjusted and Allocated to the Service of Columbus Based on a Net Return of 6, 6½ and 7 Per Cent

Account No.	Classification	Reproduction new	Less adjustments	Per cent condition	Value depreciated	Allocation factor	Allocated to Columbus
	General property:						
244	General office land	$108,906	$108,906	100.	$108,906	11.8377	$12,892
245	Other general land	2,757	2,757	100.	2,757	11.8377	326
247	General office structures	284,045	284,045	97.	275,524	11.8377	32,616
248	Other general structures	81,595	81,595	79.6	64,981	11.8377	7,692
249	General office equipment	132,145	132,145	87.9	116,101	11.8377	13,744
251	General shop equipment	104,477	104,477	79.8	83,335	11.8377	9,865
256	General tools and equipment						
253	General garage equipment	367,339	367,339	82.1	301,537	11.8377	35,695
254	General laboratory equipment	11,201	11,201	70.4	7,891	11.8377	934
255	General telephone and telegraph equipment	173,529	173,529	73.9	128,312	11.8377	15,189
	Total	$1,265,994	$1,265,994		$1,089,344		$128,953
	General overheads	226,762	161,606		140,672		16,652
	Total general property	$1,492,756	$1,427,600		$1,230,016		$145,605
	Total physical property including overheads	$96,842,783.	$89,122,923		$63,359,235		$7,506,292
	Working capital, including materials and supplies	3,700,000	.....		.....		200,000
	Going concern value	12,000,000	.....		.....		.....
	Leaseholds	.....	$1,459,010		$1,459,010	16.8150	245,333
	Rate base						$7,951,625

Ohio Fuel Gas Company

Determination of City Gate Rate for Natural Gas at Columbus, Ohio, Using Company's Reproduction Cost and Operating Expenses, Adjusted and Allocated to the Service of Columbus Based on a Net Return of 6, 6½ and 7 Percent

Allocation of Operating Expenses 1929

Class	Total	Adjustment	Adjusted Total	Allocation factor	Allocated to Columbus
Production	$9,158,798	$1,080,221	$8,078,577	16.8150	$1,358,413
Transmission	2,169,414	.....	2,169,414	10.2782	222,977
Distribution	2,485,713	.....	2,485,713	.....	.....
General	(1,089,774)	.....	(1,089,774)	12.4189	(135,338)
Total operating expense (exclusive of depreciation, return and taxes)					$1,446,052
Depreciation 3.6% of rate base					286,258
Return 6% of rate base					477,097
Total cost of service exclusive of taxes					$2,209,407
Cost of service per M c. f. exclusive of taxes (9,279,605 M)					23.8093 Cents (fair city gate rate Columbus, Ohio)
Cost of service based on 6½% return					24.2377 Cents
Cost of service based on 7% return					24.6662 Cents

NOTE: () Denotes red figures.

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[fol. 2579] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ENLARGING TIME FOR DOCKETING CASE—Filed Nov. 4, 1933

On the 29th day of September, 1933, on the petition of Appellant, The Dayton Power and Light Company was, by the undersigned as Chief Justice of the Supreme Court of Ohio, allowed an Appeal in the above entitled case from the Supreme Court of Ohio to the Supreme Court of The United States and on the same day I signed the citation therein to the Appellee returnable forty days from the above date.

It now being shown to me that the record in said case is voluminous and that the Clerk of the Supreme Court of Ohio cannot by said return day make and transmit to the Supreme Court of The United State a true copy of the material parts of said record, including the assignments of error and opinions delivered in the case, in accordance with rule 10 of the Rules of the Suppreme Court of The United States, now upon application of the Appellant, and because of the above, which is good cause for this order, and in accordance with rule 11 of the Rules of the Supreme Court of The United States, I enlarge the time of and for docketing the above entitled case in the Supreme Court of the United States and with its clerk to the 1st day of December, 1933.

In witness whereof I have hereunto subscribed my name officially at the City of Columbus, Ohio this 2 day of Nov., 1933.

Carl W. Weygandt, Chief Justice of the Supreme Court of Ohio.

Agreed to.

Edwin P. Mathews, John E. Mullin, Chester J. Gerkin, Charles P. Pforrer, Attorneys & Counsel for Appellant. John W. Buisker, Attorney General, Donald C. Power, Assistant Attorney General, Attorneys & Counsel for Appellee.

[fol. 2579a] [File endorsement omitted.]

[fol. 2580] SUPREME COURT OF THE UNITED STATES

[Title omitted]

STATEMENT OF POINTS TO BE RELIED UPON, AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed Nov. 28, 1933

Point I

The court erred as a matter of law in affirming the findings and order of the appellee in determining the reproduction cost and in fixing the value of appellant's property used and useful for the service and convenience of the public, in arbitrarily disregarding the uncontradicted testimony of witnesses whose competency and credibility were not questioned on the following material matters:

(1) The necessity for allowance and the amount of organization costs (Errors 1 and 2);

(2) The necessity for allowance and the amount of cost of financing (Errors 1 and 3);

(3) The reproduction cost of cutting and restoring paving over pipe lines (Errors 1 and 4);

(4) Going concern value (Errors 1 and 5);

(5) The amount of working capital necessary (Errors 1 and 6);

(6) The amount of undistributed construction expenditures (Errors 1 and 7).

Point II

The court erred in approving the findings and affirming the order of appellee in making allowance for appellant's operating expenses for the following items:

Annual depreciation, purchased gas, and excise tax (Errors 8, 9, 10, and 11).

[fol. 2581] Point III

The court erred in approving the findings and affirming the order of the appellee in fixing the price which appellant should be allowed to include in its operating expenses for gas purchased under contracts, in the following particulars:

(1) In disregarding the contracts between The Ohio Fuel Gas Company and appellant for the latter's gas supply, and in fixing a lower price than that stipulated in the contracts and paid, and shown by the evidence to be the fair going price and reasonable market value of said gas (Error 11).

(2) In approving the findings of fact and conclusions of law of appellee in fixing the value of the property of The Ohio Fuel Gas Company used in supplying natural gas to appellant:—

(a) In determining the cost to The Ohio Fuel Gas Company of the gas which it supplied appellant under contract and the fair and reasonable price to be paid for such gas, that only the so-called No. 1 or operated leaseholds were used and useful, and in not holding that classes known as 2, 3, and 4 were used and useful (Error 12).

(b) In not disapproving the findings and reversing the order of appellee in fixing a value of twenty five dollars per acre on the leaseholds known as Class No. 1, and in not fixing a value thereof in accordance with the evidence (Error 13).

(c) In holding and determining that the value of No. 1 leaseholds should be reduced to the "book value" thereof (Errors 14 and 15).

(d) In holding and determining that "no valuation (of the leaseholds) can be based upon market price because of the fact that there is no market for a gas property so extensive as that of The Ohio Gas Company," and in reversing and setting aside the valuation of twenty five dollars per acre for the No. 1 leaseholds (Error 19).

[fol. 2582] (e) In not determining and fixing the fair and reasonable value of the No. 1 leaseholds, and the leaseholds known in this proceeding as Classes 2, 3, and 4; and in affirming the order of appellee based on the disregard of the evidence of the present value thereof (Errors 12, 14, and 15).

(f) In determining the depreciation of the gas well construction and gas well equipment (Accounts Nos. 211 and 212) by a theoretical method having no relation to the present condition or value of said properties; and in dis-

regarding the evidence as to the present condition and actual depreciation thereof (Error 16).

(3) In approving the finding and affirming the order of the appellee in determining the operating expenses of The Ohio Fuel Gas Company, in the following respects:

(a) In failing and refusing to include in the operating expenses of The Ohio Fuel Gas Company the delay rentals paid on its leaseholds known as Classes 2, 3, and 4, or any part thereof (Error 20).

(b) In overruling the finding and order of appellee in allowing $4,158,954 for the annual amortization of certain properties of The Ohio Fuel Gas Company, to-wit: No. 1 leaseholds, gas well construction, and gas well equipment (Error 17).

(c) In holding that under the statutes of Ohio, as construed by it, a natural gas company is not entitled to an allowance for amortization or depletion of its wasting assets or property used up in the public service, and in not holding the statute repugnant to the provisions of the Constitution of the United States and void as confiscating appellant's property (Error 18).

(d) In approving and affirming the holding of appellee in disregarding the contract between The Ohio Fuel Gas Company and the United Fuel Gas Company for gas delivered at the Ohio-West Virginia state line, and in using [fol. 2583] a price for said purchased gas at a lower figure than that provided for in the contract and paid therefor (Error 23).

(e) In approving the findings of fact and conclusion of law of appellee in making allowance for the operating expenses of the United Fuel Gas Company in furnishing natural gas to The Ohio Fuel Gas Company in interstate commerce and in affirming its order thereon (Error 23).

Point IV

The court erred in approving and affirming the holding of appellee that a return of 6½ per cent upon the value of appellant's property was fair and reasonable during the

years 1929 to 1932 inclusive; and in not holding such rate of return inadequate for a company engaged in the natural gas business (Errors 24 and 28).

Point V

The court erred in affirming the order of appellee requiring appellant to refund to its consumers the difference between the rates collected for gas service under the schedules in controversy and the rates which would have obtained under the prior schedules (Error 26).

Point VI

The court erred in not examining the evidence contained in the record and in not using its own independent judgment in reviewing the findings and order of appellee in the determination of vital questions of fact and important issues of law respecting private property devoted to the public service (Error 27).

Point VII

The court erred in not reversing the order of appellee and permitting appellant's schedule of rates filed June 17, 1929, to remain in effect (Errors 25 and 28).

Each and every of the errors mentioned in the above points takes the property of appellant without due process of law and denies to it the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States. The errors mentioned in Point [fol. 2584] III concerning the valuation of the property and the operating expenses of The Ohio Fuel Gas Company and the United Fuel Gas Company confiscate appellant's property because they reduce the price which it is permitted to include in its operating expenses for gas purchased and thus affects the reasonableness and lawfulness of the schedule of rates in controversy. The errors mentioned in Point III also violate Article I, Section 10 of the Constitution.

Designations of Portions of the Records to be Printed

To Charles Elmore Cropley, Esq., Clerk of the Supreme Court of the United States, Washington, D. C.:

For the purpose of complying with the Rules of the Supreme Court of the United States, and particularly Rule

13, paragraph 9, you are hereby advised that all the record certified by the Clerk of the Supreme Court of Ohio in conformity with the præcipe filed by appellant, with the exception of certain exhibits certified as originals, is deemed necessary for the consideration of the appeal herein and should be printed.

Edwin P. Matthews, John E. Mullin, Chester J. Gerkin, Charles P. Pfarrer, Counsel for Appellant.

Service of the foregoing directions to the Clerk of the Supreme Court of the United States designating the portions of the record to be printed, is hereby accepted on behalf of the Appellee, this 27th day of November, 1933.

John W. Bricker, Attorney General of Ohio, Donald C. Power, Special Counsel and Assistant Attorney General, Counsel for Appellee.

[fol. 2585] [File endorsement omitted.]

[fol. 2586] SUPREME COURT OF THE UNITED STATES

[Title omitted]

DESIGNATION OF PORTIONS OF THE RECORD TO BE PRINTED—Filed Nov. 28, 1933

To Charles Elmore Cropley, Esq., Clerk of the Supreme Court of the United States, Washington, D. C.:

For the purpose of complying with the Rules of the Supreme Court of the United States, and particularly Rule 13, paragraph 9, you are hereby advised that all the record certified by the Clerk of the Supreme Court of Ohio in conformity with the præcipe filed by the appellee, with the exception of certain exhibits certified as originals, is deemed necessary for the consideration of the appeal herein and should be printed.

John W. Bricker, Attorney General of Ohio, Donald C. Power, Special Counsel and Assistant Attorney General, Counsel for Appellee.

Service of the foregoing directions to the Clerk of the Supreme Court of the United States designating the por-

tions of the record to be printed, is hereby accepted on behalf of the Appellant, this 27th day of November, 1933.

Edwin P. Matthews, John E. Mullin, Chester J. Gerkin, Charles P. Pfarrer, Counsel for Appellant.

[fol. 2587] [File endorsement omitted.]

[fol. 2588] SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO PRINTING RECORD—Filed Jan. 31, 1934

It is stipulated and agreed that the part of the record herein covered by Paragraph 38 of Appellant's Præcipe and designated to be printed shall include by reference pages — to — of the printed record in the case entitled, "The Columbus Gas and Fuel Company v. The Public Utilities Commission of Ohio and the City of Columbus, Ohio" (No. 608, October Term, 1933) now pending in this Court.

And in addition thereto the following:

Line 27, page 4429 record below to and including line 2 on page 4432:

"Q. Ford, Bacon & Davis took the actual prices for pipe in their united appraisal, did they not?

A. That was their testimony.

Q. I mean the actual prices paid by the company?

A. I understood their testimony that way.

Q. And did you understand that in this case they took the actual prices that the company here paid?

A. I didn't understand any definite statement to that effect. I think volume 1 of their exhibit——

Q. Page 14, are you looking at now, of Exhibit 45?

A. Yes, sir. It shows that the material prices used are those at which the company was able to purchase material in large quantities on or about the date of the valuation or quotations secured from representative manufacturers as of the date of the valuation.

Q. Yes.

A. And inasmuch as the pipe prices that were used checked with the quotations which were introduced in connection with the Columbus Gas & Fuel, it may be that they based theirs here on quotations, I don't know.

[fol. 2589] Q. Look at page 17 of that same exhibit. Do you find this there: 'The material prices used for casing, tubing and closing-in equipment are the prices actually paid by the company during the year 1929'?

A. You have quoted it correctly.

Q. Now, did you go and examine the prices paid by the Ohio Fuel Gas Company for pipe in the year 1929?

A. No, sir, but I can——

Q. Wouldn't that have something to do with it?

A. No, sir, I don't think so, in view of the prices I got in the United Fuel Gas and the pipe prices they used in the United Fuel Gas.

Q. You know that the United Fuel pipe is pipe made by a different manufacturer than the pipe in the Ohio Fuel Gas system? You know that, don't you?

A. No, sir, I don't know that, and I doubt extremely if anybody can tell who manufactured the pipe in the Ohio Fuel system or in the United Fuel system, either. It could only be told from the original invoices. You couldn't tell it from the pipe in the ground.

Q. Let me ask it this way then. Do you not know that in 1928 the United Fuel was buying from a different manufacturer than the Ohio Fuel bought from in 1929?

A. I couldn't answer that question yes or no. I don't know about either of them.

Q. Well, wouldn't it be something to look up when you are reproducing a particular property?

A. Oh, I think it is very little difference, if any. A good many engineers hold there is none—the quality of steel pipes of various manufacturers. And in reproducing the plant, you should use the lowest price for standard material that can be obtained.

Q. It is fair to assume that these companies got the lowest prices for their respective quantities and respective kinds and respective makes of pipe?

A. For the year probably, but buying pipe for a year and buying pipe to reproduce a plant are entirely different things. And weight should also be given to the fact that the break of prices which came in December 1929 meant that the man that was in the market with money to buy pipe could buy it a good deal below the standard quotations of the market.

[fol. 2590] Q. This plant could not spring up Phœnix-like; it would take some time to reproduce it?

A. Yes.

Q. How many years?

A. The reproduction period estimated by Ford, Bacon & Davis is two years, which I think is a reasonable time.

Q. If the plant had to be ready to distribute gas on January 1st, 1930, it would have to have been built within the two years preceding that, would it not?

A. Yes, sir."

Line 22, page 4353 record below to and including line 27, page 4354:

"Q. Have you made a study of the allowances for annual depreciation on the property of The Ohio Fuel Gas Company?

A. I have.

Q. And does that study appear on pages 11 and 12 of City Exhibit No. 74?

A. It does.

Q. I wish you would please explain those pages and that study?

A. Pages 11 and 12 of Exhibit No. 74 show a study of the estimated annual rate of depreciation of the property contained in the inventory of The Ohio Fuel Gas Company by accounts, based on the estimated age life. There is shown, beginning on page 11, by accounts, the various classes of property, together with their cost new.

Q. And what figures appear under—or whose figures under the heading of 'Cost new'?

A. The figures under the heading of 'Cost new' are the appraisal prepared by Ford, Bacon & Davis.

Under the heading 'Per cent' is my estimated annual rate of depreciation per year.

The figures in the last column under the heading, 'Amount of Depreciation,' is the annual depreciation in dollars per year, giving a weighted average per cent contained on page 12 of 3.6 per cent.

Opposite Accounts 211 and 212 we have placed the annual depreciation at 6.6 per cent per year which is the average per cent depreciation which we found from the study on page 9.

Q. What is your opinion as an engineer as to the relationship between annual depreciation and accrued depreciation?

A. Annual depreciation and accrued depreciation are very closely related, and for any given property the average age of that property multiplied by the annual depreciation should equal the accrued depreciation. Or, to reverse the statement, the accrued depreciation divided by the average age of the property should equal the annual allow- [fol. 2591] ance for depreciation in the future. In other words, the two are practically inseparable."

Line 25, page 4357 record below to and including page 4359:

"Q. Do you agree with the accrued depreciation of the property of The Ohio Fuel Gas Company as found by Ford, Bacon & Davis in this case?

A. I have not made an inspection of all of the property but in my opinion it is bound to be too low. The weighted average of accrued depreciation found by Ford, Bacon & Davis is 17½ per cent, which, by its nature, must be too low.

Q. Assuming that the weighted average age of The Ohio Fuel Gas Company's property is ten years, explain the relationship of accrued found by Ford, Bacon & Davis with your estimate of annual depreciation as you have just testified to?

A. If their estimate of accrued depreciation is correct then the annual depreciation allowance in the future should be 1¾ percent. If, on the other hand, my estimation of the annual depreciation allowance is correct, the accrued depreciation should be 36 percent. In other words, the annual depreciation and accrued depreciation are inseparable, and one must be in proportion to the other.

Mr. Turner: You were asking a hypothetical question as to the ten years?

Mr. Davies: Yes.

Commissioner Bricker: Based upon Ford, Bacon & Davis' study of the present condition of those wells, what would be the life, the average life, of a gas well in Ohio, approximately, if you have it?

The Witness: I can give you that, I think, sir; it will take just a second. 43¾ years.

Commissioner Bricker: And what would be the average life under your set-up?

The Witness: Between 15 and 16 years.

Commissioner Bricker: And has your study revealed to you the annual experience of this company in Ohio as to the length of life of the wells which have become totally depleted?

The Witness: Yes, sir, in a general way, but not particularly; in other words, I did not make a summary of the wells that have gone out of existence; but from the wells that we found had been abandoned I would say that that was reasonable, 15 to 16 years.

Commissioner Bricker: I wonder if you can make—either you or the representative of the company, I don't care [fol. 2592] which—a study to reveal what the life of those wells which have passed out of use, the average life, has been; if the company's records would show?

Mr. Seyffert: It is in the record, Your Honor.

Commissioner Bricker: Do you remember what it was?

Mr. Huffman: About seven years.

Mr. Seyffert: Somewhere around seven and a half to eight years. There is something in the record about the average age of the wells and the average life.

Commissioner Bricker: Well, that is what I wanted. That is in your exhibit?

Mr. Seyffert: Yes; I cannot tell which one it is in right now though.

Mr. Turner: He was answering as to the company's exhibit.

Commissioner Bricker: Yes, I meant the company's exhibit when I said 'your exhibit.'

Mr. Huffman: But that was based upon the actual figures, was it not, of the wells that have been used and that have been abandoned?

Mr. Seyffert: Yes, don't you remember some went back to 1886?

Commissioner Bricker: Yes, I remember that."

Line 27, page 4492 record below to and including line 15, page 4496:

"Q. Where do you get your experience of a fifty year life of gas well structures in Account Number 208?

A. Oh, I think that is probably a fair life for them, 2 per cent a year.

Q. What wells do you know of in this property that are fifty years old?

A. They move those things around from one place to another; move the material around; knock it down off of one and move it to another; they are just very crude little shacks.

Q. I am talking about gas well structures?

A. That is what I am referring to.

Q. And you assume that the property in Accounts 210, other production system structures; 213, field line construction; and 217, other production system equipment; and 214, can be used by the Ohio Fuel Gas Company for a period of 50 years from their original purchase?

A. Yes, sir. I might add in that connection that the figures set out there under per cent allowances are about the company's claims for annual depreciation in the United Fuel Gas Case, and which check very closely with the accrued depreciation which I found in that case after a close inspection of all the property.

[fol. 2593] Q. How much of that property in those accounts about which I have just inquired would have to be replaced within the 50 year period?

A. A good bit of it or some of it would probably have to be changed in location or moved.

Q. What have you in your allowance for extraordinary depreciation or replacements?

A. Replacements are supposed to be made from the charge in the depreciation reserve. I have not allowed for it separately. You have this annual allowance and then you make a replacement and you charge it against the reserve.

Q. In other words it is all to be taken out of this allowance of 2 per cent.

A. Or the over-all allowance of 3.6 per cent. yes.

Q. I am talking about your individual allowances here of 2 per cent.

A. It applies the same way, yes, sir.

Q. Now, down under the transmission system, you have assumed a 40 year life, have you not, for items in accounts 221, compressing station structures, 222, transmission system measuring station structures, 223, other transmission system structures, 225, transmission system measuring station equipment, and 227, other transmission system property, have you not?

A. Yes, sir.

Q. And you have made no allowance other than this for extraordinary repairs, replacements on amortization, have you?

A. I have made no allowance other than the over-all 3.6 per cent., which is made up of those various percentages that you have called forth.

Q. In account 224, which is on the page immediately under 223 and above 225, you have allowed 2.6. How do you differentiate between the depreciation in that account and the depreciation in the account immediately preceding and immediately following, which you have placed at 2.5?

A. It is totally a different class of property.

Q. I just wanted to know by what process or formula you arrived at 2.6?

A. Compression station equipment is made up of a variety of equipments. It includes the main units, the auxiliary units, pipe valve fittings around the plant, the foundations, and a number of similar units, and is about the average annual rate of depreciation that I found for that class of equipment in the United Fuel Gas, where I made a complete study.

Q. Where have you, yourself, had any practical experience in the matter of observing depreciation in items of property such as that?

[fol. 2594] A. Well, sir, I——

Q. Just name them, please.

A. Let me finish it.

Q. I am just finishing my question.

A. I am familiar to a certain extent with compressors, having unloaded, hauled, set up for permanent installation, small compressing units in connection with construction work, one of which I remember in particular was identical with a compressing unit, small compressing unit, in the United Fuel Gas property.

Q. Located where?

A. That is when I was located in Boone County.

Q. What was the capacity of this compressor of yours?

A. The capacity of the compressor?

Q. Yes, sir.

A. I don't recollect now.

Q. About how much?

A. I don't recollect. It is a small unit.

Q. What was it being used for?
A. Air.
Q. Where?
A. On a construction job.
Q. What kind of a construction job?
A. Heavy road construction.
Q. It was ten horse power, wasn't it? You testified to it?
A. No, sir.
Q. What was it?
A. It was a great deal more than that. I don't recollect what it was. It was set up on concrete foundations. It was quite an outfit.

Commissioner Bricker: How do the figures actually adopted by the West Virginia Commission compared with these set out on page 11?

The Witness: The figures adopted by the West Virginia Commission, sir, were two-fold. They made two allowances in that case. One for amortization ~~and one~~ for depreciation. The depreciation allowance was comparatively small. ~~It was 1.12 per cent.~~ The amortization allowance was 4.25 per cent. The figures that I have set out on page 11 are about the company's claim, roughly in that case for annual depreciation.

Commissioner Bricker: Did the company in that case claim any further percentage should be allowed annually for depletion?

The Witness: They made the claim as a form of amortization.

Commissioner Bricker: Which would be the same thing?

The Witness: Yes, sir."

Line 12, page 4373 record below to and including line 20, page 4383:

[fol. 2595] "Mr. Turner: Pardon me.

The Witness: Under 'Protestants Basis' we have used the claims of the protesting cities on value and the allocation percentages developed in the same manner.

Commissioner Bricker: That is the protesting cities of West Virginia?

The Witness: Of West Virginia, yes, sir.

Commissioner Bricker: The claim that they presented in that United case there?

The Witness: Yes, sir.

By Mr. Davies:

Q. Using those figures now, what is your computation?

A. We come down in the same way and arrive at a fair price for gas at the Ohio River in wholesale quantities of 15.628 cents per M based on a seven percent return.

Mr. Turner: I should have probably added that we have an additional objection to that on the question of Interstate Commerce; we have pending, you know, an objection to all of these questions. This is an attempt to fix something that passes in interstate commerce; it is an attempt to fix a rate on something that passes in interstate commerce.

By Mr. Davies:

Q. Mr. Blundon, which class of these figures did you use in adjusting the operating expenses of the Ohio Fuel Gas Company in this connection?

A. I used the class of figures under the heading 'West Virginia Commission decision.'

Q. Which is the highest figure?

A. Which is the highest figure.

Q. Namely, 20.61 cents?

A. That is correct.

Q. Have you made a study to determine the wholesale price of gas at the city gates of Columbus as of December 31st, 1929?

A. I have.

Q. And what is the basis of that study?

A. That study is made on the basis of an allocation of the property and expenses of The Ohio Fuel Gas Company to the service of the Columbus area and is made on the basis of sales, demand mileage, property, expense, in the same manner as the allocation was made in the West Virginia case.

Q. Will you please explain any adjustments that you made in the figures of the company for both property and expenses prior to the allocation of these figures?

A. Turning to page 16 of my Exhibit 74, or City Exhibit No. 74 I mean, there is listed there by accounts, according to the Uniform Classification of Accounts prescribed by [fol. 2596] this Commission, in Columns 1, 2 and 3, the inventory and appraisal of Ford, Bacon & Davis presented in this case, without alteration or change.

Under the fourth column, 'Less Adjustments,' are these figures with the adjustments that I have previously testified to and which I will outline as we proceed.

You will note that the first figure that is changed is opposite account 'Gas Well equipment' where we have changed the price of casing and tubing to conform to the first part of this Exhibit No. 74.

We have made a similar change in reproduction new of Account 214, 'Field line equipment.'

We have eliminated incomplete construction and changed general overheads to 14 percent, as previously outlined.

Under Account 221, 'Compressor Station Structures' we have eliminated the old boiler house that I testified to.

Under 'Transmission Line Equipment' we have changed the pipe prices as outlined in the first part of the Exhibit No. 74.

We have changed the general overheads on transmission system property to 14 percent.

We have changed the general overheads on general property to 14 percent.

We have eliminated from this place working capital, and made a substitution later on.

We have eliminated going concern value and have substituted for the leaseholds $5.00 per acre for the No. 1 operated leaseholds.

Under 'Operating Expenses' shown on page 18 we have made an adjustment in the production operating expenses of $1,080,221.00, due to the difference in prices of gas at the Ohio River.

Q. What do you mean by that, the difference between the——

A. The price that the company pays the United Fuel Gas Company and the fair price as previously determined in this exhibit, page 14, 20.061 cents.

Commissioner Bricker: Is that 20.061 cents based upon your $5.00 an acre valuation?

The Witness: No, sir, that is based on the figure of the West Virginia Commission.

Commissioner Bricker: Oh, I see.

The Witness: Yes, sir. Now, on page 18, the figures [fol. 2597] shown opposite 'Production,' 'Transmission,' 'Distribution' and 'General' and under the heading 'Total,' are the operating expenses as testified to by Mr. Allens-

worth and as furnished to me for the purposes of this exhibit.

Mr. Turner: That is, you just used Allensworth's and not your own figures?

The Witness: That is correct.

By Mr. Davies:

Q. In other words, if I understand you correctly then, subject to these particular items that you have mentioned, you have used the figures of Ford, Bacon & Davis as presented in this case?

A. Yes, sir, and of Mr. Allensworth as presented in this case to this point.

Q. Yes, with reference to this one particular item?

A. Yes, sir.

Q. Did you make an allocation of the property accounts and expenses of The Ohio Fuel Gas Company to determine the wholesale price just referred to?

A. I did.

Q. Will you please explain that allocation?

A. This is an allocation of the property and expenses of the entire Ohio Fuel Gas Company to the use of the Federal Gas & Fuel Company and The Columbus Gas & Fuel Company according to the use that the last named companies make of the system of The Ohio Fuel Gas Company as a whole.

This system of allocation is on the sale, demand mileage, property and expense basis and is the same system of allocation as was used in the recent United Fuel Gas Company case in West Virginia, and agreed to by both parties in that case.

Mr. Turner: We object to that statement.

The Witness: And is the same system of allocation as was used in the 1923 United Fuel Gas case, that is West Virginia Public Service Commission case No. 1516, and not contested in the Federal Courts on appeal.

In this method of allocation the production property and production system expenses are allocated to the user in the proportion that the total yearly sales of the user bears to the total yearly sales of the system as a whole.

The transmission system property and the transmission system expenses are allocated to the user in the ratio of the

demand of the user to the total demand on days of maximum demand of the system, weighted by the distance that the gas is required to be transported from its point of major compression.

In the instant case two days of maximum demand were [fol. 2598] considered, that is, January 13th, 1929, and January 23rd, 1930, and a careful study was made of the meter readings of the company, including their line check meters, to determine these demands. These were compared with the estimated maximum demands shown on maps in the company's possession.

Where no town check meter readings were available the estimated maximum demand as shown by the aforesaid map was used.

The mileages were carefully ascertained from the property record maps of the company.

The general property was allocated on the basis of property; that is, the general property was allocated to the use of Columbus in the same proportion that the allocated share of the production and transmission property bear to the total production and transmission property as a whole.

I might explain in that connection that it would have been proper to have considered the distribution property in allocating the general property if the amount of it had been available or in the record. The consideration, however, of the distribution property would have reduced the amount of general property allocable to Columbus.

The general expenses were allocated on the basis of the ratio of the allocated proportion of the production, transmission and distribution expenses as a whole.

Commissioner Bricker: Did you, in considering your distribution property, or in considering your transmission property, not segregate the distribution property that The Ohio Fuel Gas Company actually uses in distributing to consumers before allocating to the City of Columbus?

The Witness: We did not consider the distribution property at all as property. This allocation is to determine a city gate rate for Columbus or for any other point; in other words, 100 per cent of the entire property of The Ohio Fuel Gas Company is allocated to some particular service, either the service of a city gate or of an industrial consumer or a wholesale consumer outside of a city gate.

Commissioner Bricker: And you took the whole 100 per cent before arriving at any allocation at all?

The Witness: Yes, sir.

Commissioner Bricker: And that included the distribution property likewise?

[fol. 2599] The Witness: No, sir; we make no allocation of the distribution property; distribution property would be allocated direct to any user.

Commissioner Bricker: I thought you said you had not considered that and if you had it would have reduced the property allocated to the City of Columbus?

The Witness: I said we had not considered the distribution property in the allocation of the general property.

Commissioner Bricker: Oh, I see; all right.

The Witness: The general property——

Commissioner Bricker: It would be a very small fraction?

The Witness: Yes, sir, it would not make a very material difference; but the general property serves all of the property of the Ohio Fuel Gas Company, both production, transmission and distribution, but we did not have the figures on the distribution property; it would have slightly reduced the property percentage in this allocation.

Commissioner Bricker: The general property allocation?

The Witness: Yes, sir. These allocation factors are shown under the heading of 'Allocation factor' and applied, bringing a total operating expense, exclusive of depreciation, return and taxes, of $1,446,052.00.

Including depreciation at 3.6 per cent of the rate base and return at 6 per cent of the rate base, we have a total maximum cost of service exclusive of taxes to the Columbus area of $2,209,407.00, or a cost of service per M C. F. exclusive of taxes at a maximum of 23.8093 cents.

On a 6½ per cent return, this becomes 24.2377 cents. On a 7 per cent return, this becomes 24.6662 cents.

Mr. Turner: That is without the taxes?

The Witness: That is without taxes. I would like to say in this connection that in every case where a decision was to be made affecting demand mileages, we made it against the use of Columbus, and that the figures that I have just testified to are in my opinion the maximum rate on these bases and subject to the leasehold change in values.

In arriving at that computation we have used $5.00 per acre on the No. 1 operated acreage. Now, an increase of one dollar or a decrease of one dollar per acre on the No. 1

operated acreage, on a 6½ per cent return, would change the fair price at the city gate of Columbus .053405 cents per [fol. 2600] M; on a 6 per cent return, .050761 cents per M; on a 7 per cent return, .056048 cents per M.

Mr. Turner: Before Mr. Blundon leaves that page, may I ask a question? You have eliminated all of the rentals in these figures of yours? In other words, you have taken the Allensworth figures?

The Witness: I have taken the Allensworth figures.

Mr. Turner: And you have no amortization in here at all?

The Witness: Not as amortization; I have 3.6 per cent allowed for the lessening in value of the property.

Mr. Turner: But no amortization?

The Witness: Call it what you will.

Commissioner Bricker: What is that per cent?

The Witness: 3.6 per year.

By Mr. Davies:

Q. And that is on the basis of your study that you testified to recently?

A. Yes, sir, that is correct.

Mr. Turner: Speaking of this page still, have you the figures which would omit your adjustment of $1,080,221.00?

The Witness: No, sir, I do not have.

Mr. Turner: I wish that you would give them to us.

The Witness: Yes, sir.

Mr. Turner: So that we can have them for cross-examination.

The Witness: Yes, sir.

Mr. Turner: Thank you, Mr. Davies.

By Mr. Davies:

Q. Now, Mr. Blundon, since you prepared pages 16, 17 and 18 to which you have just referred, have you been furnished with the amount of taxes so that you can now give the rate with taxes included?

A. I have.

Q. I hand you what for purposes of identification has been marked as City Exhibit No. 75, entitled 'The Ohio

Fuel Gas Company determination of city gate rate for natural gas at Columbus, using Company's reproduction cost, operating expenses, adjusted and allocated to the service of Columbus, based upon a net return of 6, 6½ and 7 per cent, including taxes', and ask you if that is the study you have made up on that basis?

A. It is.

Q. Will you please explain that exhibit?

A. The figure opposite 'Operating expense' is the total operating expense exclusive of depreciation, return and taxes, as is shown on page 18 of Exhibit 74.

[fol. 2601] The figure opposite 'Depreciation' is the depreciation as shown on that exhibit.

The figure opposite 'Real and personal tax' is the real and personal property tax furnished to me by Mr. Allensworth and allocated on a property basis resulting in an allocated value of $124,713.00.

The figure opposite 'Miscellaneous tax' and 'Auto licenses' is the miscellaneous tax figure furnished me by Mr. Allensworth after allocation on a basis of general expense, the allocation figure being 12.4189 per cent; the allocated figure being $1125.00; giving a total expense before gross revenue or income and before Federal Income, Excise and P. U. C. Maintenance tax of $1,858,148.00.

This figure is carried down under the 6, 6½ and 7 per cent return.

Opposite the line 'Return on rate base' there is included 6, 6½ and 7 per cent respectively of the rate base of $7,951,625.00, the latter figure being transferred from page 17 of Exhibit No. 74.

The figures under 'Federal Income Tax', 'Excise Tax' and 'P. U. C. Maintenance Tax', under the various headings of 6, 6½ and 7 per cent return, are the calculations of those percentages on the revenue and net income, giving a total gross revenue on the basis of 6 per cent return of $2,433,402.00; on a 6½ per cent return of $2,480,239.00; and on the basis of a 7 per cent return $2,525,793.00; making a maximum city gate rate for Columbus, including all costs, on the basis of a 6 per cent return, of 26.2231 cents per M. C. F.; on a basis of a 6½ per cent return of 26.7279 cents per M. C. F.; on a basis of a 7 per cent return 27.2188 cents per M. C. F.

Mr. Turner: That is all costs except what you have eliminated in Exhibit No. 74?

The Witness: Yes, sir.

Mr. Davies: Ford, Bacon & Davis' inventory and appraisal is subject to the eliminations and adjustments he testified to.

Mr. Turner: And Mr. Allensworth's exhibits?

Mr. Davies: And what he furnished along the line of taxes.

Mr. Turner: And values, operating expenses and everything else came from Allensworth?

[fol. 2602] The Witness: Operating expenses including taxes came from Mr. Allensworth.

By Mr. Davies:

Q. And the last figures you have offered here would be the gate rate, the allocated gate rate, to the City of Columbus at the several percentages, 6, 6½ and 7 per cent?

A. Yes, sir, for the Columbus area."

In witness whereof, Counsel for the parties have hereunto subscribed their names, this 26th day of January, 1934.

Edwin P. Matthews, John E. Mullin, Chester J. Gerkin, Charles P. Pfarrer, Counsel for Appellant. John W. Bricker, Att'y Gen'l, Ohio; Donald C. Power, Asst. Att'y Gen'l, Ohio, Counsel for Appellee.

[fol. 2603] [File endorsement omitted.]

Endorsed on cover: File No. 38,212. Ohio Supreme Court. Term No. 609. The Dayton Power and Light Company, appellant, vs. The Public Utilities Commission of Ohio. Filed November 28, 1933. File No. 609, O. T., 1933.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 609

THE DAYTON POWER AND LIGHT COMPANY,
APPELLANT,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO,
APPELLEE.

STATEMENT AS TO JURISDICTION.

Rule 12 (paragraph 1) of this Court requires appellant to file a statement setting forth the basis on which it contends the Court has jurisdiction to review the decree appealed from.

The Court's jurisdiction in this case in invoked under Section 237 (*a*) of the Judicial Code of the United States, 43 Stat. 937 (28 U. S. C., Section 344), which provides that:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution,

treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

The writ of error was abolished and appeal substituted therefor by the Act of Congress approved January 31, 1928, 45 Stat. 54 (28 U. S. C., Sec. 861 (*a*)).

Nature of Case and Rulings Below.

Appellant owns the gas-distribution systems in and supplies natural gas to the municipalities of Troy, Piqua, Sidney, Tippecanoe City, North Hampton, South Charleston, and Washington Court House, and in the unincorporated territory of Wilberforce and the territory outside of and adjacent to Troy, all in the State of Ohio. Appellant owns no gas lands or leaseholds and buys its gas supply from the Ohio Fuel Gas Company at wholesale (delivered to it at the several city gateways), under contracts, at the price of 45 cents per M cubic feet.

The Ohio Fuel Gas Company buys from the United Fuel Gas Company, a West Virginia corporation, a large part of the gas it supplies appellant, which gas is produced in West Virginia and transported in interstate commerce.

Prior to June 17, 1929, appellant had on file with the Public Utilities Commission of Ohio and in effect schedules of natural-gas rates in the eight towns which did not yield to it a fair and reasonable return on the value of its property used and useful in furnishing gas service to said towns. On that date (June 17, 1929), appellant filed with said Commission new schedules increasing its rates.

Pursuant to Section 614-20 of the General Code of Ohio, the Commission suspended said new schedules of rates for 120 days from June 17, 1929, and before the expiration of the period of suspension appellant gave bond under the statute to refund to its gas consumers in the eight towns such portion of the increased rates as the Commission or a court might determine to be unreasonable and excessive, if it should be so determined.

Hearings were had and on November 21, 1930, the Commission entered an order directing appellant to produce "all evidence available touching the cost of producing or acquiring and transmitting the gas to the several gateways and of the fairness of the gateway rate of 45 cents, and failing to do this within a reasonable time, the application for the increase of rates will be denied."

Pursuant to said order appellant produced the evidence called for and proved the value of the property of the Ohio Fuel Gas Company and the United Fuel Gas Company used and useful in supplying gas to it, and also said companies' operating expenses. The Commission reduced the property values and operating costs so proved in substantial amounts, and held that 39 cents per M cubic feet was a fair price for the gas purchased by appellant, and that it would only be allowed this amount in its operating expenses, and on November 3, 1932, entered an order striking from its files said new schedules, thereby remitting appellant to the former rates, and ordered it to cease charging the new rates and to refund to its consumers in said eight towns the difference between the old and new rates, with 6 per cent interest per annum from dates of payment, the refunds so ordered amounting to over $300,000.

Appellant duly filed with the Commission an application for rehearing and its protest of said valuations, which application and protest were denied on December 20, 1932.

On December 21, 1932, appellant filed its petition in error in the Supreme Court of Ohio from said findings, rulings, and orders of the Commission; and on June 21, 1933, said court handed down a decision affirming the orders of the Commission. Thereafter, on July 19, 1933, appellant, in accordance with the rules and practice of said court, filed its application for rehearing, which application the court denied on the 20th day of September, 1933, and entered its final judgment affirming said findings and orders of the Commission.

The order of the Public Utilities Commission fixing the rates which may be charged by appellant for the use of its property in furnishing gas service to the public is a statute of the State within the meaning of Section 237 (*a*) of the Judicial Code. *Sultan Ry. Co.* v. *Dept. of Labor*, 277 U. S. 135, 136.

In its petition in error filed in the Supreme Court of Ohio appellant set forth the facts on which it challenged the validity of the order of the Public Utilities Commission as repugnant to the Constitution of the United States, and in its application for rehearing filed in said court appellant assigned numerous rulings and holdings of the Commission and court which confiscated its property, in violation of the Fourteenth Amendment to the Federal Constitution.

Application or petition for appeal to this Court was presented to the Chief Justice of the Supreme Court of Ohio on the 21st day of September, 1933, and allowed by him on that day.

The following cases and decisions of this Court are believed to sustain its jurisdiction of this appeal:

Ohio Valley Co. v. *Ben Avon Borough*, 253 U. S. 287.

State of Mo. ex rel. S. W. Tel. Co. v. *Pub. Serv. Comm.*, 262 U. S. 276.

Bluefield Co. v. *Pub. Serv. Comm.*, 262 U. S. 679.
Ohio Utilities Co. v. *Pub. Serv. Comm.*, 267 U. S. 359.
Nor. Pacific v. *Dept. of Pub. Works*, 268 U. S. 39.
Chi., etc., Ry. v. *Pub. Util. Comm.*, 274 U. S. 344.
United Railways v. *West*, 280 U. S. 234.

Appellant claims that the orders of the Public Utilities Commission of Ohio (in A. U. R. P. No. 341 on its docket) and the judgment of the Supreme Court of Ohio (in case No. 23893 on its docket) affirming said orders confiscates and deprives it of its property without due process of law and denies it the equal protection of the laws, contrary to the provisions of the Constitution of the United States, and particularly violates the Fourteenth Amendment and Section 10 of Article 1 thereof.

It is respectfully submitted that this Court has jurisdiction of this appeal by virtue of the Acts of Congress above cited.

EDWIN P. MATTHEWS,
JOHN E. MULLIN,
CHESTER J. GERKIN,
CHARLES P. PFARRER,
Attorneys for Appellant.

Dated, September 21, 1933.

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Supreme Court of the United States

OCTOBER TERM, 1933

No. 609

THE DAYTON POWER & LIGHT COMPANY,
Appellant,

v.

THE PUBLIC UTILITIES COMMISSION OF OHIO,
Appellee.

BRIEF OF APPELLANT

JOHN E. MULLIN,
EDWIN P. MATTHEWS,
CHARLES P. PFARRER,
CHESTER J. GERKIN,
Counsel for Appellant

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Supreme Court of the United States

OCTOBER TERM, 1933

No. 609

THE DAYTON POWER AND LIGHT COMPANY,
Appellant,

v.

THE PUBLIC UTILITIES COMMISSION OF OHIO,
Appellee.

BRIEF OF APPELLANT

Opinions Below

The opinion of the court below (R. 82) is reported in 127 O. S. 137, 187 N. E. 18. The final order of appellee appears at page 225 of the record; and its order of November 21, 1930 at R. 128 and is reported in P. U. R. 1931A, 332. The majority and dissenting opinions of the court below in the Columbus case (No. 608, October Term, 1933, of this Court) are reported in 127 O. S. 109, 187 N. E. 7 (R. 58-82), and the opinion of appellee in P. U. R. 1933A, 337 (R. 139).

Jurisdiction

A statement as to jurisdiction has been filed and separately printed, pursuant to Rule 12 of this Court. It is not

controverted that section 237 of the Judicial Code confers jurisdiction upon this Court. Probable jurisdiction was noted on December 18, 1933 (290 U. S. —).

Statement of Case

This case is here on appeal from a judgment of the Supreme Court of Ohio, and involves the validity of an order made by the Public Utilities Commission of Ohio and affirmed by the court fixing rates for natural gas service to be charged by appellant, a public service company. Appellant contends that the order and judgment appealed from are confiscatory and violate the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States; and also contravene sections 8 and 10 of Article 1 of said Constitution.

Appellant supplies natural gas at North Hampton, Piqua, Sidney, South Charleston, Tippecanoe City, Troy, territory adjacent to Troy, Washington Court House, and Wilberforce, Ohio, hereinafter referred to as the "towns."

This case is governed by the Pence Law, Section 614-20, General Code (110 Ohio Laws 366), Appendix B, p. 162, which has been superseded by a section of the same number (113 Ohio Laws 17).

On June 17, 1929, appellant filed with appellee new schedules containing increased rates for natural gas in the towns, to become effective July 17, 1929. Pursuant to statutory authority appellee suspended the new schedules for 120 days, after which they went into effect upon bond being given to refund any portion of such increased rates as might finally be determined to have been unreasonable or excessive.

Appellant owns the gas distribution plants in the communities it supplies with gas, but does not own any gas-producing lands or transmission pipe lines. It buys its gas supply from the Ohio Fuel Gas Company under wholesale contracts at 45 cents per M cubic feet delivered at the several town borders or city gates. A considerable portion of the gas purchased is produced in West Virginia and Kentucky and is transported to appellant in interstate commerce.

Several hearings were held by appellee, and considerable evidence introduced by appellant in the form of testimony and exhibits. No evidence was offered by the towns or by appellee.

On November 21, 1930, appellee made a finding and conclusion that the purchase price of gas was of such importance it would not make a valuation of appellant's property until it determined whether the gateway price was just, and entered an order directing appellant to produce "all the evidence available touching the cost of producing or acquiring and transmitting the gas to the several gateways and of the fairness of the gateway rate of 45 cents" (R. 134, P. U. R. 1931A 336). At the time of the entry of said order there was pending before appellee Case No. 5935 involving the rates for natural gas sold in the City of Columbus (Ohio) by the Columbus Gas & Fuel Company, which is also a distributing company only and purchases its supply of natural gas from the Ohio Fuel Gas Company at the city gate; and after the hearing and decision in that case a portion of the evidence offered in it was introduced by stipulation in this case in further support of the fairness of the price paid by appellant for gas at the town borders or gateways (R. 135).

On November 3, 1932, the appellee ordered appellant to cease charging the rates set forth in the new schedules and to refund to its consumers the difference between the rates being collected and those in effect prior to July 17, 1929 (R. 225).

The value of appellant's property used in supplying gas service to the towns and their inhabitants on July 17, 1929 (the date certain), as proved by uncontradicted evidence, was $1,250,221. Appellee, without discussing the evidence or stating any reason for its action, reduced the rate base to $868,387. The present value established by the evidence and that allowed by appellee for the several items of property disallowed or reduced, were as follows:

Property Items	*Appellant's Proof*	*Allowed by Appellee*
Organization or preconstruction costs	$ 24,774	$ 00.00
Cost of financing	39,600	00.00
Cost of cutting and restoring paving	139,545	00.00
Going concern value	125,000	00.00
Undistributed construction expenditures	130,640	99,045.00
Working capital	83,200	61,880.00

Appellee made a finding that the reasonable gateway price to be paid by appellant to the Ohio company for gas was 39 cents per M cubic feet; and, because thereof, disregarded the gas purchase contracts between appellant and the Ohio company and deducted from appellant's annual operating expenses $71,547 on account of gas purchased. Appellee also further reduced appellant's allowance for operating expenses for taxes, depreciation, and administration in the amount of $26,688.

In fixing the cost to the Ohio company of producing or acquiring and transmitting the gas to appellant, and the fairness of the contract price, the appellee did it in the same manner as if it were determining the reasonableness of utility rates for that company; and in so doing made the following findings and conclusions: (1) that of the 2,834,-187 acres of leaseholds owned, only the operated leaseholds (known in this case as leaseholds of Class No. 1) consisting of 291,396 acres were used and useful; (2) valued only said operated or No. 1 leaseholds and fixed the value at but $25 an acre; (3) that the delay rentals paid to carry the unoperated (reserve) leaseholds held to insure a future supply of gas could not be included in its operating expenses; (4) held that the price paid by the Ohio company to the United Fuel Gas Company, a West Virginia corporation, for gas produced in Kentucky and West Virginia and transported and delivered, wholesale, in interstate commerce should be disregarded in determining the operating expenses of the Ohio company, and fixed the price for said purchased gas lower than the contract price.

Appellee found that appellant was entitled to an annual return of 6½% on the value of its property, but its actual return under the order and judgment appealed from would be much less even than that.

Appellant duly filed application for rehearing, and also a protest against the property valuations made by appellee. The protest was dismissed, and the application for rehearing denied. On December 21, 1932, appellant filed its petition in error in the court below, which on June 21, 1933, handed down its decision affirming the order of appellee; and stated that the principles of law necessary to the decision of this case had been considered in the case of the

Columbus Gas & Fuel Company v. *Public Utilities Commission of Ohio*, decided the same day, and applied to it "the reasoning and conclusions of law announced in the Columbus case" (R. 86, 127 O. S. 141).

The court in this case affirmed the order of appellee; but, in the case of the Columbus Gas & Fuel Company, it reversed the order of appellee fixing the value of the No. 1 leaseholds at $25.00 an acre and held that they should be valued at only the "book value" thereof, and also reversed the findings of the appellee fixing the price which the Ohio company could include in its operating expenses for gas purchased from the United company, and fixed the price thereof at considerably less than the appellee had allowed.

Appellee based its rate order upon conditions as they appeared to it to be on November 3, 1932, instead of as they were on July 17, 1929, the day certain, and the court below affirmed the order. This action deprived appellant of the equal protection of the laws and confiscated its property.

The total amount of the refunds which appellant is ordered to make exceed $300,000.

On July 19, 1933, appellant filed application for rehearing in the court below setting forth at length the basis of its claim that errors had been committed which deprived it of its property in violation of law and the Constitution of the United States, including the allegation that the laws of Ohio as construed violate the 14th Amendment. This application was denied, and final decree entered September 20, 1933 (R. 119). Petition for Appeal to this court was presented to the Chief Justice of the Supreme Court of Ohio and allowed by him on September 29, 1933 (R. 3, 18). The case was docketed November 28, 1933.

Errors Complained of and Issues Presented

The Assignment of Errors contains twenty-nine paragraphs (R. 4-17), and the points to be relied upon number seven (R. 639-643). These several assignments of error and points relate to the findings and order of appellee (affirmed by the court) in (1) fixing the value of appellant's property, (2) making allowance for its operating expenses, (3) fixing the rate of return to which it is entitled, and (4) directing it to refund to consumers the difference between its present and prior schedule of rates.

All the errors assigned are to be urged. Summarized to indicate merely the subject matter, they may, for convenience, be grouped as follows:

I. Valuation of Appellant's Property

1. Disregard of uncontradicted, competent and credible evidence on certain items of value (errors 1 to 7, inclusive; R. 5-8);
2. Organization costs, no allowance (error 2, R. 5);
3. Cost of financing, no allowance (error 3, R. 6);
4. Cost of cutting paving over mains, no allowance (error 4, R. 6);
5. Going concern value, no allowance (error 5, R. 6);
6. Undistributed construction expenditures, proved amount reduced (error 7, R. 7);
7. Working capital, proved amount reduced (error 6, R. 7).

II. Determination of Appellant's Operating Expenses

1. Disregard of uncontradicted, competent and credible evidence on certain items of operating expenses (errors 8 to 21, inclusive, 25 and 28; R. 8-13, 17);
2. Annual depreciation allowance (error 9, R. 8);
3. Disregard of contract price of gas purchased from Ohio company at 45 cents and fixing price at 39 cents (error 10, R. 8-9);
4. Failure to include full value of property of Ohio company in determining reasonableness of purchase price of gas (error 11, R. 9);
5. Holding that only No. 1, or operated, gas leaseholds, are used and useful (error 12, R. 15-16);
6. Fixing value of Ohio company's No. 1 leaseholds at $25.00 per acre (error 13, R. 16 and 17);
7. Holding that value of Ohio company's No. 1 leaseholds should be reduced to book value (error 14, R. 10 and 17);
8. The court below, having held that the statutes provide a definite formula for valuing utility property, denied appellant equal protection in holding No. 1 leaseholds could be valued only at the book value thereof (error 15, R. 10 and 17);
9. Error in determining accrued depreciation of gas well construction and gas well equipment (error 16, R. 11 and 17);
10. Error in determining amortization of No. 1 leaseholds (error 17, R. 11-12 and 17);
11. Holding that laws of Ohio make no provision for amortization of property of public utility; and in not holding said statutes, as so construed, unconstitutional and void (error 18, R. 12 and 17);

12. Holding that valuation of No. 1 leaseholds could not be based on market value (error 19, R. 12 and 17);

13. Holding that delay rentals or carrying charges of reserve leaseholds could not be included in operating expenses (error 20, R. 13 and 17);

14. Failing and refusing to find contract price of gas, 45 cents per M cubic feet, is its reasonable value and market price (error 21, R. 13 and 17);

15. Disregarding contract between appellant and Ohio company and substituting lower amount than price paid for gas in allowance for appellant's operating expenses (error 22, R. 13 and 17);

16. Disregarding gas purchase contract between Ohio company and United company and substituting lower amount than price paid (error 23, R. 13 and 17);

III. Rate of Return Allowed

Fixing 6.5 per cent as rate of return on effective date of rates in question (error 24, R. 13 and 17);

IV. Order of Refund (error 26, R. 15 and 17);

V. Failure of Court to Exercise Its Own Independent Judgment on Questions of Fact, Etc. (error 27, R. 16 and 17);

VI. Overruling Appellant's Petition for Rehearing (error 29, R. 15 and 17);

Appellant contends that the judgment under review violates the Constitution of the United States in the following particulars: (1) It takes appellant's property without due process of law and denies to it the equal protection of the

laws, contrary to the 14th Amendment; (2) it violates Article I, section 10, which prohibits a state from impairing the obligation of contracts; and (3) it interferes with interstate commerce, contrary to Article I, section 8, clause 3.

The judgment denies to appellant the right to include in its operating expenses the price which it pays the Ohio company for gas, under written contracts between them, and fixes the amount which appellant may include in its operating expenses for such gas on the basis of what it costs the Ohio company to produce and transport the gas, in the same manner that rates are determined for a public utility; consequently, a number of the errors assigned complain of the valuation of the property, operating expenses, etc., fixed for the Ohio company. However, these errors are not alleged on behalf of that company, or urged as confiscating its property; but, because they are used to determine the amount which appellant is allowed to include in its operating expenses for gas purchased from the Ohio company and thus bear directly upon the reasonableness and lawfulness of its schedules of rates and upon the order of refund made against it, they are errors against the appellant and take its property without due process of law, and deny to it the equal protection of the laws. In other words, such errors are alleged by the appellant solely for the protection of its own constitutional rights and are urged only so far as is necessary for that purpose.

The errors assigned relate to several different subjects, which may be treated as separate issues and briefly stated as follows:

1. The judgment of the Court below, in affirming the findings and order of appellee in valuing appellant's property, takes its property without due process of law, contrary to the 14th Amendment.

(Errors 1 to 7, inclusive, bear on this issue)

2. Said judgment, in affirming the findings and order of appellee in fixing the operating expenses of appellant, takes its property without due process of law and denies to it the equal protection of the laws in violation of the 14th Amendment and of Article I, Section 10, and Article I, Section 8, Clause 3 of the Constitution of the United States.

(Errors 8 to 25 as amended bear on this issue)

3. The court below erred in holding that the laws of Ohio make no provision for any allowance for amortization of the property of a natural gas utility and in not holding that the state statutes, as so construed, are void under the 14th Amendment to the United States Constitution.

(Errors 17 and 18 bear on this issue)

4. Said judgment, in affirming the findings and order of appellee in fixing but 6.5 per cent. as the rate of return to be allowed appellant, takes its property without due process of law in violation of the 14th Amendment.

(Errors 24 and 28 bear on this issue)

5. Said judgment, in affirming the order of appellee requiring appellant to refund to its consumers the difference between the rates collected for gas service under the schedules in question and the rates which would have obtained under the prior schedules, takes its property without due process of law in violation of the 14th Amendment.

(Error 26 bears on this issue)

6. The court below did not exercise its own independent judgment in reviewing the findings and order of appellee in the determination of questions of fact as well as law, and, therefore, did not give appellant the kind of review of said order to which it is entitled under the 14th Amendment.

(Error 27 bears on this issue)

7. Said judgment, in disapproving appellant's present schedule of rates and remitting it to its former schedule, takes its property without due process of law and denies to it the equal protection of the laws in violation of the 14th Amendment, and also of Article I, section 10, and Article I, section 8, clause 3, of the Constitution of the United States.

(Errors 25 and 28 bear on this issue)

8. The court below erred in overruling appellant's application for rehearing and in refusing to hold, as it was requested to do in said application—that being the first opportunity to present said question—that the Public Utility Laws of Ohio, as construed by it in this case, violate the 14th Amendment and are, therefore, unconstitutional and void in that they make no provision for the amortization of property used up in the public service in determining the rates of a natural gas utility.

(Errors 18, 20 and 29 bear on this issue)

SUMMARY OF ARGUMENT

I

The rate base should be fixed at not less than $1,250,221 instead of $868,387 used by appellee and the court below.

The items of property and elements of value which appellee disallowed altogether, or reduced below the amount established by the evidence, are:

A. Items for which no allowance made

1. Organization or preconstruction costs;
2. Cost of financing;
3. Cost of cutting and restoring paving over pipe lines;
4. Going concern value.

Organization or preconstruction costs are necessarily incurred in the establishment of an enterprise of this character. They include compensation for the services and expenses of organizers, cost of preliminary surveys and reports, legal and engineering expense, franchise expense, security issue costs, etc., all incurred prior to commencing construction. It is well settled that such expenditures should be considered in fixing the rate base. *Ohio Utilities Co.* v. *Commission,* 267 U. S. 359, 362; *Des Moines Gas Co.* v. *Des Moines,* 238 U. S. 153, 166; *Celina* v. *Public Utilities Commission,* 116 O. S. 596, 604-605; *Beaver Falls Water Company* v. *Public Service Commission,* 76 Pa., Super. Ct. 255.

Cost of financing as used in this case represents merely the out-of-pocket expense of obtaining the necessary capital

to build the plant. It does not represent securities' discount. The Ohio statutes expressly recognize cost of financing as a part of the value of a utility's property. G. C. 499-9, Subsection G, and 8623-16, Appendix B, pp. 160, 167. Numerous commission, federal and state court decisions have approved allowances for this item. *Ben Avon Borough* v. *Ohio Valley Water Company,* 271 Pa. 346, 356, 114 Atl. 369, 373; *Quecnsboro Gas & Electric Co.* v. *Prendergast,* 31 F. (2d) 339; *Worcester Electric Light Co.* v. *Attwill,* P. U. R. 1929B, 1; *Erie* v. *Public Service Commission,* 96 Super. Ct. (Pa.) 42. The evidence is this case clearly established that such cost would necessarily be incurred in the reconstruction of appellant's property (R. 286-341).

The cost of cutting through and restoring pavement over mains and service lines is part of the trenching or ditching costs and must be included in the valuation of the company's property (R. 341). It is not possible to reproduce the property without cutting and replacing such pavement. This allowance is required by the Ohio statute (G. C. 499-9, paragraphs D and F), Appendix B, p. 160.

Appellant's *going concern value* is property which must be included in the rate base. The evidence of the value of this property item should not have been disregarded. The decisions of this Court and prior decisions of the Supreme Court of Ohio require that a public utility's going concern value be appraised and allowed in the rate base. *Los Angeles Gas Co.* v. *R. R. Comm'n,* 289 U. S. 287, 313-319; *Wabash Valley Electric Co.* v. *Singleton, et al.,* 1 F. Supp. 106 (Affirmed, 287 U. S. 488); *McCardle* v. *Indianapolis Water Co.,* 272 U. S. 400, 414; *Columbus Gas & Fuel Company* v. *City of Columbus,* 17 F. (2d) 630; *Cincinnati* v. *Public Utilities Commission,* 113 O. S. 259, 295; *Lima Tele-*

graph & Telephone Company v. *Public Utilities Commission of Ohio*, 98 O. S. 110, 124.

B. Items reduced below what evidence established

1—Undistributed construction expenditures

2—Working capital

The *undistributed construction expenditures* or general overheads are those expenditures necessarily incurred in the building of the plant but which it is not practicable to allocate to the individual property items. The only evidence introduced in this proceeding on the subject justified an allowance of $130,640 for this item, but appellee arbitrarily reduced the amount to $99,045. The adjudicated cases show the amount included in the company's valuation was neither high nor unusual. The same relative amount (approximately 17% of the value of the physical property) was approved in *Columbus Gas & Fuel Co. v. City of Columbus*, 17 F. (2d) 630. Higher allowances have been approved in numerous cases. See, *Re United Fuel Gas Co.*, P. U. R. 1925B, 705 (23½%); *Georgia Railway & Power Co.* v. *Railroad Commission*, P. U. R. 1925A, 546 (18%).

Working capital is the amount of supplies, cash, and other quick assets necessary for the safe and efficient transaction of a utility's business. It is an indispensable property item devoted to the public service. The inclusion in the rate base of the full amount of the working capital reasonably employed in the business of a utility is as vital to the successful service of its consumers as is the inclusion of the present value of its remaining property used in rendering the service. As a public utility must possess and use an adequate amount of working capital, furnished by its

investors, it must be allowed to earn a reasonable return thereon. The undisputed evidence in this case establishes that appellant's working capital should be at least $83,200. Appellee, without any evidence to support its finding, allowed but $61,880 for this item. In *Ohio Utilities Co.* v. *Commission*, 267 U. S. 359, this Court reversed the decision of the Supreme Court of Ohio which had affirmed the order of the Public Utilities Commission decreasing the allowance for working capital below the amount shown by the evidence and restored the full amount.

LI

The annual allowance for appellant's operating expenses should be increased by at least $111,614.22 (for purchased gas, depreciation reserve, taxes, and administrative expenses), the amount deducted by appellee and the court.

Appellee allowed but $13,721 for annual depreciation, although the proof showed at least $43,981 to be necessary. The amount claimed by appellant in this case is less than that usually allowed in natural gas cases.

Appellee used only 1.35% in computing the state excise tax, although the act of the Legislature of Ohio effective April 5, 1932 (Sec. 2294 G. C., 114 Ohio Laws 19), fixed 2.35% on the gross receipts of the company for the next five years.

Much of this difference arises from the appellee's using 39¢ per M. c. f. for gas purchased in its computation, whereas the company actually paid 45¢. It ruled that the gas purchase contracts between appellant and the Ohio company were not "void, or a sham or fraudulent" (R. 134),

but disregarded them because made between affiliated corporations and substituted 39¢ per M c. f. for the contract price of 45¢. The contracts being disregarded, appellee held that the only way for appellant to prove the reasonableness of the city gate price for gas was to show its cost to the supplying company. This action was contrary to both the federal and state constitutions. This Court has held that "common ownership is not of itself sufficient ground for disregarding such intercorporate agreements" (*United Gas Co.* v. *R. R. Commission*, 278 U. S. 300, 320). As held in *International Ry. Co.* v. *Prendergast*, 1 F. Supp. 623, 630: "The test is whether, because of the intercorporate relations, the plaintiff claiming confiscation is improperly diverting its revenue to other corporations."

The uncontradicted evidence proved the reasonableness of the contract price by the established standards for determining it. The proof of the market value of the gas at the city gates would have been sufficient to measure just compensation for the gas if it had been requisitioned by the United States Government or taken by the state of Ohio for public use. *U. S.* v. *New River Collieries Co.*, 262 U. S. 341, 344.

If the Ohio company were furnishing gas to appellant exactly as it is at present, except that it was doing so without an express contract as to price, and brought an action to recover for the gas so furnished on the theory of quantum valebat the proof here introduced would have been sufficient to establish the fairness of the price of 45¢ per M c. f.

The general market value of the gas is the minimum below which regulation may not go without violating the constitutional inhibitions against confiscation. It seems

clear therefore that appellee and the court below erred first in disregarding the contracts, and again in holding that the evidence did not sustain the fairness of the contract price for gas delivered at the city gates.

Appellee's holding that only Class No. 1 leaseholds are used and useful is contrary to the uncontradicted evidence of competent and creditable witnesses. The evidence shows that leaseholds of Class No. 2, and even of Class No. 3, are actually supplying gas in the public service. Appellee gave no reason for holding that these leaseholds are not used and useful. The undisputed evidence shows that all the leaseholds, Classes 1, 2, 3 and 4, are necessary to assure an adequate supply of gas for a reasonable time in the future, and that such a company could not be financed without reserve acreage.

Appellee's valuation of such gas leaseholds as it valued is only about two-thirds of the lowest value thereof testified to by any witness or supported by any evidence. Its reasons for rejecting the present value of No. 1 leaseholds are contrary to law and the proved facts. It adopted twenty-five dollars per acre for Class No. 1 leaseholds because that value was used in the Logan case, regardless of facts which differentiate the two cases.

The court below, in the Columbus case, disapproved appellee's valuation of $25.00 per acre for Class No. 1 leaseholds and held that they could be valued only at their "book value." The rules of accounting prescribed by appellee for natural gas utilities which they are bound to follow under heavy statutory penalties prevent them from including in their capital accounts anything except the first cost of the leaseholds, which is generally merely nominal. Nothing is included in the capital accounts, or "book value,"

for the increase in value of the leaseholds due to the discovery of gas thereon. The general market value of the leaseholds was proved by the uncontradicted testimony of several witnesses whose competency and credibility are not questioned. This character of testimony has been approved in numerous other natural gas rate cases. (*People ex rel the Pennsylvania Gas Company* v. *Public Service Commission of New York*, 198 N. Y. S. 193; *Pennsylvania Gas Company* v. *Public Service Commission of New York*, 207 N. Y. S. 599, 605, 606, 608; *Erie* v. *Public Service Commission*, 278 Pa. St. 512, at 525-527; *Wheeling* v. *Natural Gas Company of West Virginia*, P. U. R. 1933 D, 1, 33-49).

The appellee and court below appeared to rely on the decision of this Court in the United Fuel case, 278 U. S. 300, but that case is clearly distinguishable. In its opinion in the United Fuel case this Court stated the company did not rely on, and did not prove, the market value of its leaseholds; in this case the company did rely on, and did prove; the market value of the gas leaseholds. The valuation of leaseholds in the United Fuel case, when allocated to No. 1 leaseholds only, amount to $97 per acre; in the present case the value used for the same class of leaseholds is only $5.38 an acre.

If, as the appellee and the court below held, there could be no general market for such a large leasehold acreage, they should have valued the leaseholds on the opinions of the witnesses contained in the record; they could not lawfully set up a standard of proof which would exclude the only available evidence (*Brooks-Scanlon Corp.* v. *U. S.*, 265 U. S. 106, 125-126; *Standard Oil Co.* v. *Southern Pacific Co.*, 268 U. S. 146, 155-156; *Sinclair Refining Co.* v. *Jenkins Co.*, 289 U. S. 689, 698; *Montana Railway Co.* v. *Warren*, 137

U. S. 348, 353; *Kansas City So. Ry.* v. *Interstate Commerce Commission*, 252 U. S. 178).

Appellee made an allowance of $4,158,954 for what it termed amortization for only three items of property; (1) gas well construction, (2) gas well equipment, and (3) No. 1 leaseholds. On its own theory, it should have allowed $1,347,135 more than that. In fixing the amount to be allowed for annual amortization or depletion of No. 1 leaseholds, appellee, after determining their present value to be $7,284,900, arbitrarily and erroneously deducted 58.1126 per cent of that value and computed amortization on only the remaining part of the present value—that is, on $3,051,455 instead of $7,284,900. The failure to make allowance for amortizing all of the property being used up in the public service was clear error.

The court below held that no allowance could be made under the Ohio statute for the amortization of the wasting assets of a natural gas utility.

In *Pub. Serv. Comm'n.* v. *Utilities Co.*, 289 U. S. 130, 135, this Court said:

> "The due process clause of the Fourteenth Amendment safeguards against the taking of private property, or the compelling of its use, for the service of the public without just compensation."

The decision of the court below on this point is revolutionary. This Court has held repeatedly that the use of property cannot be taken in the public service without just compensation. It follows that the Ohio statutes, as construed by the court below violate the 14th Amendment.

Appellee and the court below held that the *lease rentals* on the reserve gas acreage should not be included in the

company's operating expenses. The undisputed evidence showed that it is the universal practice in the natural gas business for a producing company to pay such lease rentals and charge them to operating expenses. With the exception of the recent case of *Wichita Gas Co.* v. *Public Service Commission of Kansas,* 2 F. Supp. 792, we know of no other case where the propriety of this established practice of the industry has been questioned.

III

The rate of return should be fixed at not less than 8 per cent. instead of 6½ per cent. used by appellee and the court below.

Appellee indicated in its opinion in the *Columbus* case that it would have fixed a higher rate of return but for the existing business depression. The depression did not exist on the effective date of the schedule here in question. Furthermore, a higher rather than a lower rate of return is necessary and warranted during a period of severe contraction in a utility's revenue due to depressed business conditions. *Smith* v. *Birmingham Gas Co.,* P. U. R. 1932B, 241, 245-247; *Wichita Gas Co.* v. *Public Service Commission of Kansas,* 2 F. Supp. 792, 811.

All the evidence on the subject shows appellant is entitled to a minimum return of eight per cent. Because of the greater risks of the natural gas business appellant is entitled to a higher rate of return than most other utilities. "Eight per cent. is considered necessary for utilities generally." *Plainfield-Union Water Co.* v. *Board of Public Utility Com'rs.,* 30 F. (2d) 846, 857. The natural gas industry operates under more hazardous conditions for investors

than many public utilities. *Re Ashtabula Gas Company* (Ohio Commission), P. U. R. 1917D, 790, 795-796; *Re Baker Natural Gas Utility* (Montana Commission), P. U. R. 1921E, 609, 627; *Pennsylvania Gas Co.* v. *Public Service Commission,* 207 N. Y. S. 599, 611; *Wichita Gas Company* v. *Public Service Commission of Kansas,* 2 F. Supp. 792 (affirmed, 290 U. S.——).

The factors entering into the determination of a fair rate of return have been stated by this Court in numerous cases. See *United Railways* v. *West,* 280 U. S. 234, 249.

IV

The order to make refund of the difference between the present and prior rates is unwarranted and should be set aside.

The judgment below directed appellant to refund to consumers all collections made by it under the schedules effective July 17, 1929, in excess of the previously existing schedules. Such order would be legal only if the present rates were unreasonable on July 17, 1929. They could not be made unlawful by any conditions which subsequently developed. Appellee and the court below made no findings as to what were reasonable rates on the date certain in this case.

V

The court below did not give appellant the kind of review it is entitled to under the Fourteenth Amendment.

The court plainly did not consider the testimony and exercise its own independent judgment thereon, but followed the appellee in making assumptions of vital facts which are not only unsupported by any evidence, but directly contrary to all the competent and credible testimony.

VI

The court overruled appellant's application for rehearing.

The court held that the laws of Ohio make no provision for amortization of a utility's property. Appellant's application for rehearing raised the question of the constitutionality of the Ohio public utility laws as construed by the court. There was no opportunity to raise the question earlier. The court denied the application. (R. 119) This, we submit, renders the Ohio statutes unconstitutional and void under the Fourteenth Amendment.

ARGUMENT

I

Valuation of Appellant's Property.

1. The court erred in making no allowance for appellant's Organization or Preconstruction costs.

This item (amounting to $24,774) was disallowed in its entirety without any discussion at all by either appellee or court. The testimony of Mr. Emery and Mr. Hamilton shows clearly the necessity for and propriety of the amount claimed for organization or preconstruction costs in this case. (R. 275, 284.)

Commissions and courts have quite uniformly recognized the necessity of including an adequate allowance to cover this item in the valuation of public utility property. In *Des Moines Gas Co.* v. *Des Moines*, 238 U. S. 153, 166, this Court quoted with approval the Master's report which made an allowance for this item, and referred to it as: "Time and money expended in the promotion of the enterprise, in the organization of the company and interesting capital therein, including, also, legal expenses, obtaining the necessary franchise, as well as the costs of incorporating the company."

In *Brooklyn Borough Gas Co.* v. *Prendergast*, 16 F. (2d) 615, 630, the Statutory Court approved an allowance of $325,000 (5% of the reproduction cost of the property in question) for organization and preconstruction costs.

In *Ft. Fairfield Light & Power Co., et al.* v. *Maine Public Service Company*, P. U. R. 1933B, 493, the Public Utilities

Commission of Maine made an allowance of $20,000 for organization expenses, saying at page 511:

> "The fact that there are certain necessary expenditures incident to forming a corporation and putting it in readiness to do business is well recognized. In addition to these immediate organization costs, and more often prior to the actual organizing of the company, a preliminary investigation of the territory is made by the parties interested, including a survey of towns relative to their population, industries, and other possible sources of business, which ofttimes requires services of engineers, legal talent, and office employees. The costs of these services are not charged or included in the direct construction costs, but are, nevertheless, a part of the cost of organizing the company and are properly chargeable to organization."

This Court reversed the court below in *Ohio Utilities Co.* v. *Commission,* 267 U. S 359, because it had eliminated from the rate base the estimated preliminary and organization expense. At page 362 of the opinion it was said: "Reproduction value, however, is not a matter of outlay but of estimate and should include an allowance for organization and other overhead charges that necessarily would be incurred in reproducing the utility."

The cost of organization of companies in Ohio is recognized by the General Corporation Act (Sec. 8623-16 G. C.), Appendix B, p. 167. Anyone familiar with the organization of a utility or non-utility enterprise knows that substantial costs are incurred prior to the actual construction of the plant. The amount proved for this item in this case ($24,774) is less than 2 per cent. of the rate base.

2. The court erred in making no allowance for appellant's cost of financing.

The evidence is positive and undisputed that to reproduce appellant's gas property in the towns the cost of financing would be at least $39,600. Appellee and the court below disregarded the evidence and made no allowance whatever for this item. As used in this valuation, the cost of financing represents only the actual cash outlay in obtaining the necessary capital with which to build the company's plant. It does not represent stock or bond discount.

The testimony on this subject was presented by four witnesses: F. H. Lerch, Jr., the engineer in charge of the valuation; James A. Emery, vice-president of Ford, Bacon and Davis, Inc.; F. C. Hamilton, an executive and chief engineer of Henry L. Doherty & Company, and Dr. Frank Parker of the Wharton School of Finance and Commerce of the University of Pennsylvania.

The respective qualifications and experience of these witnesses is given at the beginning of the testimony of each R. 255, 279, 271 and 303. Mr. Lerch and Mr. Emery bring to the case not only the technical training of engineers, but the extensive practical experience of Ford, Bacon and Davis, Inc., in the formation, financing and management of utilities and other business enterprises. Their testimony is not based on theory, but on intimate knowledge of what actually occurs in the financing of such companies.

Mr. Hamilton has an experience in such matters that is almost unparalleled. He speaks not only from a vast experience in making valuations of public utility and non-utility companies, but from a direct and extraordinary extensive experience in the actual financing of public utilities

and other business companies. He knows intimately the established practices followed in these transactions, what can and must be done, and the effect of every step.

Dr. Frank Parker has not only been engaged in the scientific study of the question of financing and operating public utilities and other business enterprises in connection with his profession as an instructor in the Wharton School of Finance and Commerce for a period of 20 years, but also has had a large practical experience as an advisor of corporate and other investors. His testimony shows the most intimate knowledge of such transactions; he has both the theory and the practice.

The testimony of these witnesses leaves no room for reasonable doubt that the cost of financing is a necessary expense in the construction of a utility like appellant, and is a part of the investor's capital which is entitled to the same protection as other property used in the public service.

Answering a question by appellee's chairman, Mr. Lerch testified that this is not a plan which engineers accustomed to testifying before commissions have designed and fixed up to give estimates of the costs, but is just a statement of what actually occurs in the ordinary conduct of business; that the firm of Ford, Bacon and Davis, Inc. do this kind of work all the time (R. 289-290).

Mr. Lerch further testified that the cost of financing is fundamentally different from discount on the sale of securities, and simply covers the out-of-pocket expense of the company in getting together the money for use in constructing the plant; that discount is established (increased or decreased) in order to make a security attractive to the investor (at a given interest rate) but this has nothing to do with the expense involved here (R. 291).

Mr. Emery testified that cost of financing must not be confused with securities discount; it covers the utility's expenses only in raising capital to build its plant. By way of explanation, he said that if a company sells its bonds to a security house at 90, and the latter sells them to the public at 94, the difference between 90 and 94 is what is here called cost of financing; the difference between 94 and par is called discount (R. 332-335).

Mr. Emery gave in detail the actual cost of financing a number of recent issues of natural gas securities, showing relative expense much in excess of the amount here claimed. He stated that the amount included for cost of financing in this case is the minimum, and that it could be done for this small amount only under the most favorable circumstances.

Mr. Hamilton testified that appellant would have to employ some investment house or pay salesmen to sell its securities; that this cost must be incurred whatever type of security is used for raising the money required. He stated that the market for natural gas securities has always been limited and restricted, and the cost of financing such properties high; that all of the outstanding bond issues had cost from 5 to 15 points to sell (R. 296).

Mr. Hamilton expressed the opinion that a natural gas company could usually sell bonds to the extent of half its capital requirements, preferred stock to the amount of one-fourth, and common stock for the remaining one-fourth; that the investor in common stocks assumed much the greater risk and naturally required a higher return on the investment (R. 302). He thought the amount claimed for cost of financing in this case considerably less than appellant would be obliged to expend in reproducing its property (R. 299).

Mr. Hamilton further testified that the only way for appellant or investors in its securities to get a return on the money expended for cost of financing was through the inclusion of this capital item in the rate base; that it is never amortized as is bond or other security discount (R. 303).

Dr. Parker testified that the cost of financing is the expense incurred by the company in obtaining money, and includes reasonable compensation to investment bankers or others for their services in disposing of security issues, and for the risk assumed in underwriting them. He stated that cost of financing and bond discount are entirely separate and distinct; the former being the compensation paid bankers or salesmen for services rendered the company, and the latter representing the difference between the par value of securities and the price paid therefor by investors. Discount is a function of the interest rate—it represents an adjustment of the stated rate of return on securities to current rates in the investment market (R. 306).

Dr. Parker stated that the cost of getting the money used in building the plant represented a part of its value just as much as the cost of assembling the materials and of the labor going into its construction (R. 309).

Referring to cost of financing the court below said:

> "The commission in this matter claimed to have followed the decision in the case of Wabash Valley Electric Co. *v.* Young, 287 U. S. 488, 53 S. Ct. 234, 77 L. ed., 348, decided by the Supreme Court of the United States on January 9, 1933; also the case of the Portsmouth Gas Co. *v.* Public Utilities Commission, 119 Ohio St., 24, 162 N. E. 106." (R. 85, 127 O. S. 140)

The appellee made no reference to cost of financing in its order in this case (R. 225), and did not cite the cases mentioned by the court in its opinion in the Columbus case, but did discuss the subject briefly (R. 161, P. U. R. 1933A, 357).

The customary method of organizing a public utility enterprise is by the formation of a corporation and the assembling of capital from a large number of people who become stockholders and bondholders. Practically all public utilities have been financed through public subscription. This process costs money and effort. Several times during the hearing in this case questions were asked or observations made by members of the commission indicating they were indulging the assumption that utility plants are built by a few men who have "in their pockets" the money to construct the property and put it into operation. (R. 312.) When Dr. Parker explained that large utilities were not built that way, but that money had to be raised from numerous security holders, the chairman said: "I grant you that" (R. 313).

The Ohio statute expressly recognizes cost of financing as a part of the value of a utility's property. Subsection G of Section 499-9, General Code. The state statutes also recognize services rendered in the sale of its securities as an element of value for which it may issue its stock. Section 8623-16, G. C., Appendix B, at pp. 160 and 167.

As observed by the Supreme Court of Pennsylvania in *Ben Avon Borough* v. *Ohio Valley Water Co.*, 271 Pa. St. 346, 356, 114 Atl. 369, 373, "everybody knows that expenses are necessarily incurred in such sales; even our Victory and Liberty Loans could not be marketed except at a very heavy cost."

In the Ohio Valley Water case the company claimed 7½% for cost of financing. The public service commission made no allowance for the item (P. U. R. 1917C, 390, on rehearing, page 436); on appeal, the superior court reversed the commission and allowed the claim for cost of financing (68 Pa. Super. Ct. 561). The supreme court of the state reversed this judgment and set aside the allowance for cost of financing (260 Pa. St. 292). After reversal by this Court (253 U. S. 287) and remand to the superior court, it was held that $92,415 should be added therefor (75 Pa. Super Ct. 295). On the second appeal to the state supreme court (271 Pa. St. 357) that court overruled its prior decision, saying (at p. 357):

> "In order to render innocuous the error made in our prior opinion, that 'brokerage for the sale of its bonds * * * should properly be considered in connection with the interest charge, and should not be included in the fixed capitalization of the company as the basis of a permanent charge,' we now overrule it. As stated, brokerage is a principal expense, just as it would have been had the labor and materials been paid for in bonds at their market value, as in effect was done."

In the case of *Erie* v. *Public Service Commission*, 96 Pa. Super. Ct. 42, the court held that:

> "Cost of financing is a proper element of value to be considered in a reproduction cost estimate. It is a definite item of cost and by the introduction of the testimony of witnesses familiar with the cost of issuing and marketing securities it should be possible to determine it with substantial accuracy." (Syllabus)

In a leading English case, *National Telephone Company v. Postmaster General,* 29 Times L. R. 190, the question of cost of obtaining capital was discussed, where as in this case the method followed for ascertaining value was reproduction cost less depreciation. The court said:

> "The first question then is, would it, in fact, cost anything to provide the necessary capital? The company has given evidence, by way of example that it cost them 4.1 per cent. to raise 5½ million pounds. No one has given evidence that it would not cost anything, nor has that proposition been put forward even in argument. I know of no commodity and no service that can be procured as of right for nothing. I am clear that, as a fact, money cannot be procured for nothing.
>
> "It has been said that it cannot be an element adding to the value of the plant. The thing transferred here is the plant in *situ* and the cost of construction, less depreciation, is the method by which the value has to be ascertained. It follows that every expense, which is necessary in order to construct is an element to be considered, and it has to be considered because it is necessary in the process of construction. The thing to be transferred, say a pole, must be procured, transported and erected; each of these steps is necessary to the existence of the pole in *situs;* each of these steps cost money and raising this money is in itself an expense and is one as necessary to the existence of the pole as any other steps.
>
> "This is clear even in the case of one pole, but when money amounts to millions, it becomes clearer, for no one has millions of pounds in his pocket or even, I suppose on current account at his banker's. The result of this is that this cost stands out and is clearly seen."

In the case of *Brooklyn Borough Gas Co.* v. *Prendergast,* 16 F. (2d) 615, the court allowed a manufactured gas company 4% of the rate base for cost of financing; and in *Queens Borough Gas & Electric Co.* v. *Prendergast,* 31 F. (2d) 339, 5% was allowed a similar company by the Statutory Court. In *Worcester Electric Light Co.* v. *Attwill,* P. U. R. 1929 B, 1, 5% was allowed for cost of financing in a reproduction cost estimate of an electric property.

In "Economics of Public Utilities" (1931) by L. R. Nash, it is said (p. 155):

> "Financing costs for an entire project, as distinct from recurrent additions to capital, usually amount to not less than 5 per cent. In many well-known cases of established corporations 10 per cent. has been paid in recent years, although such percentage should ordinarily be considered as high except for new properties and those with which investors are not acquainted."

In *Wabash Valley Elec. Co.* v. *Young,* 287 U. S. 488, 500, this Court declined to reverse the decision of the lower court making no allowance for cost of financing where "there was no evidence that such cost was incurred, or that it necessarily would be incurred in the event of reconstruction." That is not the situation here. All the evidence on the subject in this case showed cost of financing to be a necessary and unavoidable expense of building and/or reconstructing appellant's plant.

Everyone knows that a utility plant does not materialize spontaneously. The prospective consumers exist, the potential investors are available, and the organizers envision the need and opportunity; but much effort and money must be expended in surveying, planning, and constructing the prop-

erty to be used in rendering the service. The expense incurred in gathering together from numerous sources the capital required represents a cost which the business must bear. The money paid as compensation for services performed in raising the necessary capital is just as truly a part of the cost of the plant as the sums paid manufacturers and dealers for specific items of property used in the structure. Each piece of pipe, lumber, etc. bought has in the purchase price the costs of its manufacture and distribution. The cost of comparable services in obtaining money must also be included in the reconstruction (present value) of the property.

3. The court erred in disallowing the cost of cutting and restoring pavement over mains and service lines in the valuation of appellant's property.

The cost of cutting through and restoring pavement over mains and service lines is a necessary part of the trenching or ditching costs in installing pipe lines. The uncontradicted evidence is that on July 17, 1929 (the date certain in this case) the cost of cutting and restoring the paving over appellant's pipe lines in the towns would be not less than $139,545. Appellee disallowed this item without comment, and the lower court merely cited the cases of *Des Moines Gas Co. v. Des Moines*, 238 U. S. 153, and *Newark Natural Gas & Fuel Co. v. City of Newark*, 92 Ohio St. 393, in support of its action in making no allowance therefor.

The Des Moines case originated in Iowa where there was no statute in force similar to the Ohio statute prescribing the method of valuing the property of a public utility. Section 499-9 General Code (sub-section D) provides that in fixing the value of such property "the cost of new pro-

duction as of a date certain, of all physical property other than land" shall be used. Section 499-13, G. C., provides that—"Whenever the authority is conferred or the obligation imposed by law upon the commission to ascertain the value of any public utility or railroad, such valuation under such authority or obligation shall be made in accordance with the provisions of this act." In its decision in the Columbus case, 127 O. S. 109, the court held the Public Utilities Commission had "no vestige of discretionary power" in the premises, and must follow the legislative formula in ascertaining the value of property of a public utility for the purpose of fixing the rate base.

The Newark case was decided by the Supreme Court of Ohio July 2, 1913, prior to the effective date of the statute in question (G. C., 499-9).

If a new company undertook to install duplicate plants in the towns the cost of cutting and restoring pavement in the streets would necessarily be incurred. Also, if such company had before it for consideration the question of purchasing the existing natural gas plants or constructing new ones in the towns served by appellant there can be no question but that in determining what it could afford to pay for the present property it would include substantially the cost of cutting and replacing the pavement, the same as it would the cost of the balance of the trenching and the mains.

Allowance has been made for the cost of cutting and restoring pavement in ascertaining the value of utility property in condemnation cases. In *Wichita Water Company* v. *Wichita*, 271 Fed. 973, 976 (reversed on other grounds, 280 Fed. 770) the court said:

> "However, the question of merit raised on the exceptions is: Did the special master proceed in the

making of deductions from the replacement cost as by him ascertained and stated, in accordance with the established practice in such cases, as shown by his report? In this respect, the report reads:

'I have also included the cost of cutting and replacing pavements existing over mains on December 1, 1917, since, in the construction of a new plant in the location of the old one, it would be necessary to cut and replace all pavements over existing mains, as now located. It does not follow, however, that the cost of cutting and replacing pavements over existing mains constitutes an item to be considered in arriving at the market value of the property. The fact that it would be necessary to incur this expense in the construction of a new plant does not add to the value of the property as it now exists. The earning capacity of the plant is not enhanced by the fact that the city has seen fit to construct pavements over the mains, since their installation by the plaintiff. This, I understand to be the view of the Supreme Court of the United States, as expressed in the case of Des Moines Gas Company *v.* Des Moines, 238 U. S. 153. The valuation in that case was for rate making purposes, but I think the rule has equal application in sales cases.'

Now, while it is true in the case of *Des Moines Gas Co.* v. *Des Moines, supra,* the Supreme Court did exclude from the replacement value of the plant involved in that case the cost of replacing mains, pipes, etc., underneath the paving and macadam work of the city, yet the question in that case was one of just rates of service to be charged the consumers of gas, and was not one as to the fair market value of the plant involved therein, based on its replacement theory. To have replaced or reconstructed the system of waterworks involved in this controversy in the City of Wichita on the date mentioned would

have required the cutting and restoring of a large amount of paving concrete, asphalt and other solid materials. To have done this would have taken much labor and at an expenditure of a large amount of money. Why, then, must not this increased cost of reproduction be computed in the cost of replacement? Any method or system of reasoning employed in mathematical calculations or computations, if sound in principle, must hold good in its last analysis and ultimate conclusion. If not, it is unsound in principle and should not be adopted.

To my mind, the fact the City has done this paving, macadamizing, etc., since the water mains were laid by the Water Company, would be no ground for excluding this item from the computation. If the City were doing the work of replacement, it would be required to do precisely the same amount of cutting and restoring the paving, macadam, etc., as would a private company. Suppose by some freak of nature the soft loam soil through which the pipes of the Wichita Waterworks System were laid had hardened, since they were laid, into granite rock. The value of the water furnished through the mains to the consumer might not for this reason be thus increased; but the value of the plant based on any theory of reproduction or replacement must have been thereby increased, for, in order to replace or reproduce, it would have required the expenditure of a large amount of money in cutting and blasting the granite.

It follows that the exceptions taken to the report of the Special Master in excluding this item of replacement must be sustained."

There is no more reason for allowing this cost in a condemnation case than in a rate case. *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 410.

Paving adds to the value of the distribution system laid under it, as well as to other kinds of property along the street. There is no more logical reason for depriving the owner of gas mains of this enhanced value than of the owners of land and building abutting on the street. This fact was recognized by Circuit Judge Hough in *Consolidated Gas Co. v. City of New York*, 157 Fed. 849, 855, who pointed out that both the construction costs and value of pipe lines in city streets had increased, and observed that,—

> "If it be true that a pipe line under the New York of 1907 is worth more than was a pipe line under the city of 1827, then the owner thereof owns that value, and that such advance arose wholly or partly from difficulties of duplication created by the city itself is a matter of no moment."

In *Wilcox v. Consolidated Gas Co.*, 212 U. S. 19, 52, this Court said:

> "If the property, which legally enters into the consideration of the question of rates, has increased in value since it was acquired, the company is entitled to the benefit of such increase."

The Ohio statute does not permit the exclusion of any part of the necessary reproduction cost of a utility's property. The action of the appellee and court in this case resulted in their using as a reproduction cost of the property an amount admittedly less than it would cost to reproduce it.

4. The court erred in not making an allowance in the rate base for appellant's proved going concern value.

In its opinion (R. 85, 127 Ohio St. 140) the court below said:

"As to going concern value, the commission took the view that the burden was on the company in this matter, and found failure of proof in that behalf."

The appellee made no such finding. It did not include this item of property in its valuation or give any reason for its failure to do so. In its opinion in the Columbus case, appellee disposed of this property item with the statement: "Going concern value will be disallowed." (R. 168, P. U. R. 1933A, 362.)

Three witnesses testified regarding appellant's going concern value—Messrs. F. C. Hamilton, James A. Emery, and F. H. Lerch, Jr. Each of these gentlemen has had extensive experience in the valuation of this class of property. No evidence was offered by the towns or the commission on this subject matter.

Mr. Lerch stated that while he personally made a specific appraisal of appellant's physical property only he has given considerable thought to its going concern value and would fix the value of this property item applicable to the eight towns at approximately $129,000 (R. 371).

Mr. Hamilton expressed the opinion that $140,000 represented the very minimum amount for the going concern value attached to the gas plants involved in this proceeding (R. 426).

Mr. Emery made a careful appraisal of appellant's going concern value and a report prepared by him thereon was introduced as Exhibit No. 7. He testified that he had "endeavored to make such appraisal as would represent what anyone would actually have to spend in order to produce this situation as it is" (R. 448). Mr. Emery appraised the applicable portion of this item of property (to the eight towns) at $125,000.

Going concern value is usually proved by opinion testimony. The value of this class of property cannot be determined with mathematical exactness, but as was said in *Denver Union Stock Yard Co.* v. *U. S.*, 57 F. (2d) 735, 744, "even if accurate computation is not possible, a value which actually exists should not be ignored because of the difficulty of its measurement. There is no rule by which the value of a leg or an arm can be accurately measured in dollars and cents, nor by which pain and suffering can be computed; yet triers of fact do evaluate such things."

Competent opinion evidence of intangible property is no more to be ignored than similar evidence of the value of tangible property. In fact, it is the best and usual form of proof of the value of both classes of property. The alleged difficulty of ascertaining the amount of a company's going concern value has often been exaggerated by those not wishing to consider it in a valuation of the property. Anyone familiar with a given utility industry or business can make a reasonably accurate estimate of what this property item is worth. Its valuation presents no baffling problem to the prospective purchaser.

In *Wichita Gas Co.* v. *Public Service Commission of Kansas*, 2 F. Supp. 792, 806, the Statutory Court said:

> "That such a value exists is acknowledged by all engineers and appraisers, and is a matter of common knowledge. That allowance therefor cannot be denied because of difficulty in evaluation, is settled by decisions of the Supreme Court of the United States and of the supreme court of Kansas."

Space need not be used in quoting definitions of going concern value. The business world is as familiar with this

kind of property as it is with electricity. Very few electricians could give a dictionary definition of electrical energy. Economists argue over finespun definitions of interest, but this term like that of going value is a general concept. What everybody understands needs no explanation. Everyone recognizes that the property of a concern doing a successful business is worth more than the same physical plant with no business attached. The least experienced person knows that a functioning piece of property—a furnished dwelling, a horse broken to ride, etc.—commands a higher price than similar property which requires the expenditure of further time, effort, and money to make it usable.

Appellant is a well-established utility, furnishing a necessary service, and was shown to be operated upon a high efficiency basis. That there is an element of value in such a plant over and above the bare physical property is clear, and has not been questioned. The amount of the additional value (a minimum of $125,000) was definitely proved in this case. The language used in *St. Louis & O'Fallon Ry. Co.* v. *United States*, 279 U. S. 461, 467, that the commission failed "to apply the law of the land to facts developed of record in matters committed" to it, is sharply applicable to appellee and the court below in this case.

In laying down valuation rules for rate cases, this Court has made no distinction between the physical and non-physical portions of a utility's property. In *Denver* v. *Denver Union Water Co.*, 246 U. S. 178, 192, it was said:

> "This element of value (going concern) is a property right, and should be considered in determining the value of the property, upon which the owner has a right to make a fair return when the same is privately owned although dedicated to public use."

In appraising this company's plant the value of the intangible property cannot be omitted any more than the tangible or physical property. In *Adams Express Co.* v. *Ohio*, 166 U. S. 185, 218, this Court said:

> "In the complex civilization of today a large portion of the wealth of a community consists in intangible property, * * * It matters not in what this intangible property consists—whether privileges, corporate franchises, contracts or obligations. It is enough that it is property which, though intangible, exists, which has value, produces income and passes current in the markets of the world. * * * Now, whenever separate articles of tangible property are joined together, not simply by a unity of ownership, but in a unity of use, there is not infrequently developed a property, intangible though it may be, which in value exceeds the aggregate of the value of the separate pieces of tangible property."

We do not claim that the cost of developing a utility's business represents its going value. The investment or outlay made to secure this property is not the measure of its value. As pointed out in *Brooklyn Borough Gas Co.* v. *Prendergast*, 16 Fed. (2d) 615, 636, the question is what is the *worth* of its going value rather than its cost. If a utility has been well conceived and the expenditures for establishing an earning power have been economically and intelligently directed, the result in a seasoned property like that of appellant will be a going concern value much greater than the money costs incurred to create it.

While original cost does not, of course, determine present value, evidence of costs was introduced for the purpose of showing that substantial expenditures of money, time, skill and the foregoing of profits until an earning power is

developed, are required to create this intangible property. Far from being a gift, going concern value is hard-earned and requires money, time, well-directed effort and sacrifice to produce, and the testimony in this case shows such expenditures.

In its opinion in the Columbus case (R. 71, 127 Ohio St. 124) the lower court said:

> "The members of the commission were unanimous in the disallowance of going concern value as a separate item. In a number of cases this court has affirmed such action by the Commission. City of Cincinnati *v.* Public Utilities Commission, 113 Ohio S. 259, 148 N. E. 817; Hardin-Wyandot Lighting Co. *v.* Public Utilities Commission, 118 Ohio St. 592, 162 N. E. 262; Logan Gas Co. *v.* Public Utilities Commission, 121 Ohio St. 507, 169 N. E. 575. Similarly the Supreme Court of the United States in a recent case, Los Angeles Gas & Electric Corporation *v.* Railroad Commission of California, *supra*, refused a going value claim of approximately nine million dollars.
>
> This court is of the opinion that in the instant case this refusal was proper."

It seems apparent that the court either failed to read the opinion of the commission on this subject or is less frank regarding its treatment of going concern value than was appellee. The commission did not say it disallowed going concern value "as a separate item"; but definitely stated that "Going concern value will be disallowed" (R. 168, P. U. R. 1933A, 362).

If by its statement that, "Similarly the Supreme Court of the United States in a recent case, Los Angeles Gas & Electric Corporation *v.* Railroad Commission of California,

supra, refused a going value claim of approximately nine million dollars,'' the court below intended to imply that no allowance was made by this Court for going concern value in the Los Angeles case it must also have failed to read that opinion.

In the Los Angeles gas case (289 U. S. 287, 313-319) this Court reviewed its prior decisions on going concern value and stated in the most positive language that rate fixing authorities must include this item of property in the rate base. The syllabus reads: "Going value is included in the rate base in determining whether rates are confiscatory. The rate fixing authority is not entitled to treat a living organism as nothing more than bare bones." This Court found that of the rate base of $65,500,000 fixed by the commission the amount of $5,618,235 "may be regarded as applicable to whatever intangible value the property had as a going concern." This sum is equal to approximately 11 per cent of the value of the company's physical property.

In *McCardle* v. *Indianapolis Water Co.*, 272 U. S. 400, 411-412, the Court said:

> "The report further stated: 'A good property has an intangible value or going concern value over and above the value of the component parts of the physical property. * * * Any reasonable man with a knowledge of this property and the local conditions would unhesitatingly affirm that it had a value far in excess of the value of the pipe, buildings, grounds and machinery. Consider its earning power with low rates, the business it has attached, its fine public relations, its credit, the nature of the city and the certainty of large future growth, the way the property is planned and is being extended with the future

needs of the city in view, its operating efficiency and standard of maintenance, its desirability as compared with similar properties in other cities and with other utilities of comparable size in this city. These things make up an element of value that is actual and not speculative. It would be considered by a buyer or seller of the property or by a buyer or seller of its securities.'

. . . . . .

The commission January 2, 1923 in No. 6613 included $1,416,000, being 9.5 per cent. of the amount attributed to the physical elements to cover water rights and going value. November 28, 1923 in No. 7080, it included only $980,000 to cover working capital, water rights and going value. There is no specification of the amount assigned to each. It stated that the amount was a smaller percentage of the value of the physical property than is usually allowed in such cases. There is nothing in the record to justify the reduction. Deducting $135,000 for cash working capital, the amount included for water rights and going value is less than six per cent. of the value of the physical elements as fixed by it. Having regard to the character of the system, that amount is clearly too low. The valuation engineers called by the Company appraised water rights and going value separately. Each fixed the value of water rights at $500,000, and one put going value at $2,000,000 and the other at a slightly higher figure. The commission's engineer made no appraisal of water rights or going value. The evidence is more than sufficient to sustain 9.5 per cent. for going value. And the reported cases showing amounts generally included by commissions and courts to cover intangible elements of value indicate that ten per cent. of the value of the physical elements would be

low when the impressive facts reported by the commission in this case are taken into account."

The decisions of the court below in this and the Columbus case show how far it has veered to the left since its statement fifteen years ago in *Lima Telephone & Telegraph Co.* v. *Public Utilities Commission*, 98 Ohio St. 110, 124, that:

> "On the other hand, the value that results from the fact that the concern is in active operation, that the physical property, the buildings, the equipment and plant and capital are all active, and together make a going concern, is a thing that must be taken into consideration."

In this case, appellee departed from its custom of the past few years of "considering" going concern value in connection with general overheads and baldly stated that no allowance would be made for this kind of property. The court evidently overlooked the fact that the customary formula was not followed in this case, and that even lip service was denied the utility.

The witnesses in this case did not make allowances for going concern value in the general overheads or other property items contained in the valuation, such as are referred to in *Hardin-Wyandott Lighting Co.* v. *Public Utilities Commission*, 118 O. S. 592, but made a separate and specific valuation of this particular item of property. The overheads or undistributed construction expenditures are construction costs. They have nothing to do with going concern value. All such costs are incurred before a purely static plant exists, and are the same if the property is never operated. The expenditures and work in connection with

the creation of going concern value must be made subsequent to construction.

In discussing structural overheads in *Re Indianapolis Water Co.*, P. U. R. 1923D, 449, 473, the Indiana Commission said: "* * * it is physical cost which cannot be allocated to the separate units and which is, therefore, treated in a lump sum, using some percentage of the cost of the remaining property. It is not an intangible, but is an actual tangible part of the cost of the physical property." In *Re Chesapeake & Potomac Telephone Co.*, P. U. R. 1916C, 925, 951-952, the Maryland Commission said:

> "The items which we have enumerated as 'construction overheads' form just as much a part of the actual cost of the physical property in place when we come to value it, as do the items of material and the cost of the day laborer who finishes the property in the shop or puts it in place on the ground. The only difference is that while we can always allocate or apportion to the specific account the cost of the article as it comes from the shop or factory and the cost of the labor directly used in putting it in place, we cannot so readily allocate or apportion to individual articles, or even individual accounts, those costs which are spread over a great number of both similar and dissimilar articles; such as 'interest during construction,' 'engineering and superintendence,' and the others above enumerated. These are 'overheads' in the sense that they are spread over a great number of articles, but they are in no sense 'intangibles,' since they are just as clearly a cost of the physical property as those costs which we have termed 'directly distributed costs.' 'Intangibles,' on the other hand, relate more particularly to those items which pertain to the 'business' of the utility or to the additional value which it has by reason of

being a going concern, rather than to its physical property.

Thus the expenses of organization are incurred not for the mere purpose of constructing the plant and putting it in condition to do business, but more particularly and specifically for the purpose of conducting the business when the plant is in a position to do business. And so the 'cost of establishing business,' 'going value,' etc., all relate to the business as such rather than to the physical property of the utility.

We make this explanation at this length for the reason that there is an idea in some quarters that when 'construction overheads' such as we have enumerated are allowed in a valuation for rate-making purposes, the utility is being given the benefit of some imaginary or wholly speculative cost to which it has not proven itself clearly entitled, but which is given it merely upon the assumption that it or something else like it must have been incurred in the construction of its plant and property. We trust that we have made it clear that such is not the case, but that these 'construction overheads' when established are just as much a part of the actual cost of the physical property as is the labor and material which have entered into and been directly traced to each separate item of the same."

As already noted the three appraisals of going concern value in the record are as follows: Mr. Lerch—$129,000; Mr. Hamilton—$140,000; Mr. Emery—$125,000. In *Westinghouse Electric & Mfg. Co.* v. *Denver Tramway Company*, 3 F. (2d) 285, the court held that the special master could not in any event be justified in reducing the allowance for going value below the lowest amount given in the testimony.

While this court's concern may be only with the question whether the total value fixed (rate base) was sufficient to cover all classes, items, and elements of appellant's property, it is apparent that there is no surplus or extra allowance in this valuation which can be applied to going concern value.

5. The Court erred in reducing appellant's undistributed construction expenditures from $130,640 to $99,045.

The appellee disregarded all the evidence on the subject and used 14 per cent. of the value of the physical property as found by it for this item without giving any reasons therefor. The court below merely said (127 O. S. 140, R. 85):

> "As to general overheads, the commission allowed 14 per cent., being the same as allowed the Ohio Fuel Gas Company in the Columbus case, and is more than that allowed in the Columbus Gas & Fuel Company case."

The several items included in undistributed construction expenditures (general overheads) are carried in the uniform classification of accounts prescribed by the commission under the following headings:

Engineering and superintendence during construction
General officers' and clerks' salaries during construction
General officers' and clerks' expenses during construction
Office supplies and expenses during construction
Law expenditures during construction.
Insurance during construction
Interest during construction.

The evidence shows that $130,640 should be included for undistributed construction expenditures, which is approximately 17 per cent of the value of the physical property.

Mr. Lerch testified that the amount included in the valuation made by Ford, Bacon & Davis, Inc., for undistributed construction expenditures was based upon their experience in building similar plants (R. 465).

Mr. Hamilton testified that these expenses are necessarily incurred in the construction of a property of this character, and that the amount contained therefore in the Ford, Bacon & Davis appraisal was low (R. 469-70).

The propriety of including undistributed construction expenditures (which it is not feasible to apportion to the individual items of property) in reproduction cost appraisals of a utility's property has been approved by this court in numerous cases. In *Des Moines Gas Co.* v. *Des Moines*, 238 U. S. 153, 166, this Court approved 15 per cent. of the rate base of an artificial gas company (exclusive of real estate) for general overheads, and, in addition, an allowance for organization expenses.

The adjudicated cases show the amount included for these expenditures in this case to be neither high nor unusual. In *Columbus Gas & Fuel Co.* v. *City of Columbus*, 17 F. (2d) 630, 17% was approved. In *Georgia R. & Power Co.* v. *R. R. Commission*, P. U. R. 1925A, 546, the court approved 18% in valuing a gas utility. In *Re United Fuel Gas Company*, P. U. R. 1925B, 705, the West Virginia commission allowed slightly more than 23.5%. In *Elizabethtown Water Co.* v. *Utilities Commission*, P. U. R. 1929C, 531, the court approved an allowance of 17%.

6. The court erred in reducing appellant's claim for working capital from $82,200 to $61,880.

Neither the appellee nor the court gave any reason for disregarding the record evidence on this subject matter, or for using the formula adopted and fixing the arbitrary amount they did. In *Ohio Utilities Co.* v. *Commission*, 267 U. S. 359, this Court reversed the appellee and lower court in this case for arbitrarily reducing the amount of the working capital testified to by witnesses as necessary.

The amount of working capital needed is determined as a matter of business judgment based upon the utility's experience. Obviously, a sufficient quantity of materials and supplies must be kept on hand at all times to enable the company to make such repairs and replacements as are currently required in the maintenance of the property; and sufficient cash must be kept in banks to meet its current obligations and maintain its credit standing.

The propriety of allowing an adequate amount of working capital in the rate base of a public utility is universally recognized. In *Vincennes Water Supply Company* v. *Public Service Commission*, 34 F. (2d) 5, 8, the Circuit Court of Appeals for the Seventh Circuit said:

> "There can be no question as to the necessity of working capital in the management of any enterprise. It furnishes the means by which business is transacted. It meets the payroll and the current bills for materials and other running expenses. A capital fund for these purposes, present from day to day in amounts adequate for the reasonable needs of the company, must be supplied. It should be an amount such as reasonable business men, experienced, would require in the conduct of this kind of business, and

we find in various cases allowances of from three to eight per cent. for that amount."

The working capital requirements in the gas business generally runs between 5 and 7 per cent. of the present value of the property. The following allowances are typical of the reported gas cases:

	Amount	Per cent. of Rate Base
Des Moines Gas Co. v. *Des Moines*, 238 U. S, 153	$140,000	6.67
Brooklyn Borough Gas Co. v. *Prendergast*, 16 F. (2d) 615	500,000	5.78
New York & Richmond Gas Co. v. *Prendergast*, 10 F. (2d) 167	344,146	6.04
New York & Queens Gas Co. v. *Prendergast*, 7 F. (2d) 351	230,000	6.25
Aluminum Goods Manufacturing Co. v. *Laclede Gas Light Co.*, P. U. R. 1927B, 1	2,600,000	6.
Springfield v. *Springfield Gas & Fuel Co.*, P. U. R. 1916C, 281	55,000	7.53
Commercial Club v. *Citizens Gas & Fuel Co.*, P. U. R. 1916E, 1	45,825	6.45

To adopt the the language of this Court in *McCardle* v. *Indianapolis Water Co.*, 272 U. S. 400, 412, the amount claimed and proved by appellant in this case "is low when compared with those included in other cases" (citing several gas cases in footnotes). The action of appellee and the court below in substantially reducing the amount of working capital established by the evidence was plain error and should be set aside.

II.

Appellant's Operating Expenses

1. The judgment of the court below, in affirming the order of appellee fixing appellant's annual operating expenses, disregards the uncontradicted testimony of competent and credible witnesses and the recently enacted statute of the State of Ohio increasing excise taxes; and, therefore, takes appellant's property without due process of law and denies to it the equal protection of the laws in violation of the 14th Amendment.

The operating expenses of appellant for the year 1929 amounted to $722,359, and the estimated annual expenses under the rates in question amounted to $726,531 (Exhibit 8, page 16; R. 581). The only controverted item included in these figures is the purchase price of gas, hereinafter separately discussed. These figures relate to the operating expenses substantially as of the effective date of the present schedules. The appellee allowed only $622,333. Of the total difference of $104,198, $71,547 results from reducing the purchase price of gas from 45¢ to 39¢ per M., and $30,260.00 is a reduction in the annual allowance for depreciation, which is also hereinafter separately discussed.

After the hearing and before the determination of the case by the appellee, the State of Ohio increased the excise taxes 1%, which would amount to $7,416.22. The appellee and the court below took no notice of this increase. The balance is general administrative expense.

2. The judgment of the court below in affirming the order of the appellee fixing the annual depreciation allowed appellant takes its property without due process of law contrary to the 14th Amendment.

The proof showed $43,981 as necessary for appellant's annual depreciation requirements for its property in the towns (Exhibit 8, R. 581). The testimony was uncontradicted and there is no question as to the competency and credibility of the witnesses. The appellee allowed only $13,721 without discussing the evidence.

Sec. 614-23, G. C., provides that the rates of the utility shall be sufficient "to the necessity of making reservation out of the income for surplus, depreciation and contingencies, and all such other matters as may be proper."

The following allowances were made for depreciation, etc., in a few natural gas cases:

Re Great Falls Co., P. U. R. 1928E, 803, 8%;
Re Clarksburg Light and Heat Co., P. U. R. 1917A, 577 (W. Va. Com.), 10%;
Re Oklahoma Nat. Gas Co. (Okla Corp. Com.), Cause No. 3322, 12%;
Re United Fuel Gas Co. (W. Va. Com.), P. U. R. 1918C, 193, 7% of "production investment," 5% of "transmission lines";
Re Western Nat. Gas Co. (Okla. Com. No. 1565, May 16, 1919), Bul. 611, p. 5, 10% for replacement.

It is plain the amount claimed by appellant, 4 percent of the value of its depreciable property, is not only conservative, but too low. Neither the appellee nor the court

below made any reference to the testimony, or gave any reason for rejecting it. The order and judgment are, therefore, arbitrary, unlawful and confiscatory.

3. Failure to allow the cost of gas purchased.

(1) Appellee and the court below erred in disregarding the contracts between appellant and the Ohio Fuel Gas Company and in allowing appellant to include in its operating expenses only 39¢ per thousand for said gas instead of the contract price of 45¢.

Appellant has a written contract with the Ohio company to supply it natural gas wholesale at the gateway of all the towns at 45 cents per M. cubic feet (Exhibit 9, R. 582; and Exhibit 10, R. 585).

The appellee disregarded these contracts and substituted 39 cents per M. for the contract price of 45 cents, thus refusing to allow appellant the sum of $71,547 paid for gas annually in its operating expenses.

Appellee, in its order of November 21, 1930 (R. 128, 134), refused to proceed with the determination of the reasonableness of appellant's rates, unless all the evidence that could be obtained as to the cost to the Ohio company of the gas sold and delivered to appellant was introduced.

Appellee's order was based on two theories: (1) because the parties were affiliated corporations the contracts should be disregarded, and (2) such contracts being disregarded the only way to prove the reasonableness of the city gate price was to prove the cost of the gas to the Ohio company.

Appellant's contention is that the contracts were made by it with the Ohio company in good faith; that it is a separate and distinct corporation, exercising its own corpo-

rate functions and conducting its own business; that the contracts were approved by its board of directors; and *that the price specified in said contracts is fair and reasonable, being the going market price of gas in like quantities and under like conditions and the best price that could have been obtained by appellant from any source.*

Points of Difference Between This and Other Cases

This case differs from other cases in which a similar question has arisen; in several particulars:

1. There are no common officers and only one common director of the Ohio company and appellant;

2. The appellee, in its finding of November 21, 1930, expressly held:

> "We do not hold the contract between the producing and the distributing company void or a sham or fraudulent" (R. 134).

This ruling ought to be controlling.

3. The appellee, in this case, ruled that the Ohio company, in selling gas to the appellant, under the contracts in question, is not acting as a public utility (R. 132), and this holding is in accord with the authorities.

But whether the Ohio company be treated as a utility or a non-utility in furnishing the gas in question, we submit that the evidence in this case establishes that the contracts are fair and reasonable, and, consequently, the contract price should be included in the appellant's operating expenses.

TWO FUNDAMENTAL PRINCIPLES MAY BE STATED:

1. "Common ownership is not of itself sufficient ground for disregarding such intercorporate agreements" (*United Fuel Gas Company* v. *Railroad Commission of Kentucky*, 278 U. S. 300, 320).

2. An intercorporate contract which unduly favors a subsidiary or affiliated corporation may be disregarded.

The test for determining when such a contract *unduly favors* a subsidiary or affiliated corporation is as follows:

If the regulated company "*is * * * receiving substantial benefits from the contract and probably could not have secured better terms elsewhere,*" *although the affiliated corporation may be receiving the larger share of the profit, the contract cannot be disregarded* (*United Fuel Gas Company* v. *Railroad Commission of Kentucky, supra,* at p. 320).

The application of the foregoing principles and test to this case should prove decisive of this question. In no fair or reasonable view of the evidence can it be said that appellant does not receive substantial benefits from the contract or that it could obtain better terms elsewhere.

The language quoted on this point in the opinion of the appellee from the opinion of this Court in the United Fuel case did not relate to the gas purchase contracts involved therein, but to a contract for the division of the profits from the manufacture of gasoline, which gave the subsidiary company four times as much profit as the supreme court of appeals of West Virginia had held it was entitled to. Concerning that arrangement, this court said:

> "It entered into a contract with this subsidiary by which it receives one-eighth of the gross profit from the gasoline extracted. The commission and

the supreme court of West Virginia, in Charleston *v.* Public Serv. Commission, 95 W. Va. 91, 120 S. E. 398, in which the United Company was a party, held that 50 per cent was a fair share of the net return of the subsidiary's business attributable to appellant United Company, and this was the conclusion adopted by the court below." (278 U. S., at 320)

The case of *Ohio Mining Co.* v. *Public Utilities Commission,* 106 O. S. 138, is cited by the appellee as sustaining its order in this case. We submit that is a wrong interpretation of the case. In that case the court held:

> "Where a corporation is not a public utility within the definition of the General Code, the Public Utilities Commission is without power to make an order affecting such corporation. But where a contract of such corporation involves the rates and charges which a public utility must receive to earn a fair return on its investment, the Public Utilities Commission may investigate and determine whether such contract is just and reasonable to the public utility *by the standard of the cost of production by such public utility, or by the standard of the price at which such public utility may be able to purchase such product from other persons or corporations, or both,* and may base upon such finding, plus a reasonable return upon the investment of the public utility and a reasonable sum for depreciation, the price and charge at which such public utility shall sell its service." (Syllabus)

Measured by the standard laid down in the above decision the contract price is fair and reasonable.

Cleveland v. *Public Utilities Commission,* 102 O. S. 341;

Southern Power Company v. *Public Utilities Commission*, 110 O. S. 246;
Cincinnati v. *Public Utilities Commission*, 113 O. S. 259, 293, 294.
Jonas v. *Swetland Co.*, 119 O. S. 12, 16.

(2) Evidence shows fairness of city gate price

The following considerations, we submit, show that the fairness of the town gate price was established by the evidence introduced before the appellee prior to the order of November 21, 1930:

If the Ohio company and the appellant were not affiliated and the Ohio company were furnishing gas to the appellant exactly as it is now, except that it was doing it without an express contract as to price, and brought an action to recover for the gas so furnished on the theory of quantum valebat, the proof required would be the reasonable market price of the gas, and its cost to the seller would be immaterial.

U. S. v. *New River Collieries Co.*, 262 U. S. 341;
L. Vogelstein & Co. v. *U. S.*, 262 U. S. 337.

In such a case the testimony introduced in this case would be accepted as sufficient.

The proof of the market value of the gas at the town gates introduced prior to appellee's order of November 21, 1930, would have been sufficient to measure just compensation for the gas if it had been requisitioned by the United States government or taken by the state for public use.

By uncontradicted testimony, the appellant proved the reasonableness of the contract price of 45¢ and that it could not obtain a supply of gas at a lower price.

The evidence consisted of a tabulation of rates paid by certain distributing companies to wholesale companies, for gas at the city line, Exhibit 13 (R. 590) shows the going price of gas in Ohio in like quantities and under similar circumstances and conditions; and Daniel S. Webber testified that the general market value of natural gas in like quantities as that purchased by appellant from the Ohio company was 45¢ or more per M (R. 475-476). In answer to an inquiry by appellee of Mr. Howland as to how the contract price compared with wholesale rates of natural gas for industrial purposes, Exhibit 15 was introduced. This exhibit consisted of certain portions of a pamphlet issued by the United States Department of Commerce, entitled "Natural Gas in 1928," which showed the average rate for gas sold for industrial purposes in the state of Ohio in 1928 was 45.9¢ per thousand. Further, it was proved by Mr. Webber that the usual and necessary price of gas, at city gates, for domestic purposes, is one-third higher than the price for the same amount of gas for annual delivery for industrial purposes, due to the fluctuation in the demand for domestic purposes in extremely cold weather, etc. (R. 476).

No attempt was made to controvert any of this testimony. We submit that this evidence justifies the contract price of 45¢. *We also submit that a price which does not exceed the general market value of the gas at the time and place in question cannot lawfully be held to be unfair or unreasonable, that anything less than the fair market value would not be just compensation for gas, and that the state of Ohio has no power to fix a price which is less than just compensation.*

The decisions of this court leave no doubt that the compensation to be paid for property taken for public use is

the "equivalent in money" of the property taken; and that general market value is the final measure of compensation. No distinction is made between the various kinds of property and there is no reason why the rule does not apply to natural gas as well as to any other property. In addition to the cases already cited as to what constitutes just compensation, the following are also pertinent:

Chicago, Milwaukee & St. Paul Railway Co. v. *Minnesota,* 134 U. S. 418, 458;
Monongahela Navigation Co. v. *United States,* 148 U. S. 312, 326;
United Railways v. *West,* 280 U. S. 234;
Seaboard Air Line Railway Co. v. *United States,* 261 U. S. 299, 304.

From the foregoing considerations and authorities, it follows that even if the appellee did have the power to regulate the city gate price, it could not, under the evidence, lawfully fix it at anything less than the contract price.

(3) The court below erred in affirming the finding and order of appellee, made in fixing the reasonableness of the contract price paid by appellant for gas, in determining the accrued depreciation of the properties of the Ohio Fuel Gas Company known as gas well construction, Account No. 211, and gas well equipment, Account No. 212.

The reproduction cost new, per cent. condition and present value of the properties of the Ohio company known as gas well construction and gas well equipment, as determined by appellee (R. 177), were as follows:

		Reproduction Value	*Percent Condition*	*Present Value*
211	Gas Well Construction	$14,192,077	41.8874	$ 5,944,692
212	Gas Well Equipment	9,715,175	41.8874	4,069,434
	Total	$23,907.252		$10,014,126

The "percent condition" of 41.8874 used was determined by arbitrarily deducting from 100% the decline of 58.1126% in the original rock pressure of the wells (R. 158).

On the other hand, the company's determination of accrued depreciation of these properties is on the basis of their actual present condition. Company Exhibit No. 45 (R. 2912) shows the values of the properties as follows:

		New	*Less Deterioration*
Acct. 211	Gas Well Construction	$14,192,077	$11,353,662
Acct. 212	Gas Well Equipment	9,715,175	7,772,140
	Total	$23,907,252	$19,125,802

The company's method is described by Mr. Weymouth at R. 1624 *et seq.*, the following being some pertinent extracts from his testimony:

> "A. As to gas well construction, I consider the well, that is, the hole in the ground, as one of the physical elements of the property and one of the necessary links in that property for the purpose of getting the gas from its original position in the sand to the consumer for its use. That hole is precisely the same character as other physical elements of the property, and any depreciation that might be sustained——
>
> Q. Well, do you mean by that, the same character, as if a pipe line continued on down there to the bottom of the well, something of that sort? A. No, what I mean is, it is just as much a unit of

physical property necessary for the transportation of this gas as the pipe line is or as a compressor is or as even the buildings are. It is a separate unit of the plant necessary for the conduct of this business.

. . . . . .

Neither is the value of that hole dependent upon the rock pressure in the well. If the rock pressure is high in the beginning in one well and lower in another well, if the two wells cost the same amount of money, they will have the same value for rate purposes. If one well exhibits a greater decline of rock pressure than the other well, the value in the hole does not change by that.

In other words, the only thing that could change the value of that hole is a change in its condition, either its physical condition or its functional condition, and as long as it is ascertained that neither of those conditions has changed, the value of the well has not changed.

Q. Then what you have said in respect of well construction applies equally to gas well equipment? A. It does. The condition of the equipment determines the amount of depreciation sustained, just as the condition of the well hole determines the amount of depreciation sustained in it.

Q. I wish, if you could, at that point, illustrate by two wells of similar cost put in at about the same time, one having a large initial cost, another a smaller initial cost, one a high rock pressure, and another a low rock pressure? A. If we take that as an illustration, two wells might be assumed to cost a fixed amount, let us say, $10,000.00 each, one of them in a field which will show a rock pressure of a thousand pounds, and have an open flow of a million cubic feet of gas per day, the other one having a rock pressure of 500 pounds, and an open flow

capacity of 500,000 cubic feet of gas per day, those wells will both be valued at their cost of construction, namely, $10,000.00 each.

Q. Is there any justification, in your opinion, for making the present value of one of them much less on account of the rock pressure? A. No, there is not. To continue the illustration, if the thousand pound well having a million feet open flow should be drawn upon until its rock pressure has declined to 500 pounds and its open flow 500,000, which is the condition assumed for the comparative well, the value of the high pressure well would not have declined 50 per cent but would remain the same and be the same as the other well (R. 1627-8).

In *Pacific Gas Co.* v. *San Francisco*, 265 U. S. 403, this Court held that:

> "In determining the amount deductible for accrued depreciation when valuing the property of a public utility for the purpose of testing the adequacy of rates during a period already elapsed, estimates of competent experts based on examination of the plant subsequent to the depreciation are preferable to averages based on assumed probabilities." (Syllabus)

Mr. Weymouth's testimony is clear and convincing that the decline in rock pressure in a well, or a field, has nothing to do with the determination of the accrued depreciation of either gas well construction or gas well equipment. Nevertheless, the appellee depreciated the reproduction cost new of such wells 58 per cent because, and only because, of a decline in the original rock pressure of the wells.

The difference in the two methods of determining accrued depreciation of these two items of property, in this

case, amounts to $9,111,686. The appellee's determination of the accrued depreciation of these two items of property by a purely theoretical and arbitrary method, regardless of the fact as to the present condition and present value of said properties, deprives the Ohio Fuel Gas Company of a return to which it is entitled upon $9,111,686. This error is peculiarly glaring in view of the express provision of *section 499-9 G. C.*, that the present value of a company's physical property other than land must be determined by deducting from the reproduction cost new the depreciation thereof, and the holding that appellee has no vestige of discretionary power in the matter.

It is no answer to say that the utility gets the cost of the well returned to it through annual depreciation charges on the same basis on which the accrued depreciation is determined. Investors put their money into a utility to get a return thereon and are entitled to that return, and utility consumers are obligated to pay a reasonable return on the value of the property so long as it is used in the public service. Investors, we submit, cannot, without violation of the 14th Amendment, be deprived of the benefit of their investment, nor consumers relieved of the duty of paying for the use of the property in the public service, until that property ceases to be used and useful.

It does not matter that this arbitrary and theoretical method is adopted in some systems of accounting. It may provide a convenient accounting method for income tax purposes, etc., but that consideration is not pertinent here (*Weiss* v. *Weiner*, 279 U. S. 333). No accounting system which shows results differing from the substantial facts can be controlling in a confiscation case.

This is not a question of the weight of conflicting testimony, but deals with the *competency* of the testimony—to the possibility of determining the fact of accrued depreciation of these properties by the method which appellee used and the court affirmed. It is not a minor question, but is of vital importance to natural gas producing utilities.

(4) The holding by appellee and the court below that only those gas leaseholds known as Class No. 1 were actually used and useful, and their refusal to include in the valuation leaseholds of Classes 2, 3 and 4, was arbitrary, unlawful and confiscatory.

The detailed lease maps in evidence (Exhibits 142, 143 and 144) show numerous instances of leases of No. 2 classification in close proximity to wells on the Class No. 1 leases. The evidence also shows that the existing wells on No. 1 leases have already drained to a considerable extent leaseholds of Class No. 2 (Weymouth, R. 1381-82; Dally, R. 1137; Webber, R. 1302). For instance, Webber, at R. 1313, testified that No. 2 leases are already depleted by 35%. Of course, such of the leases of Class No. 2 as are being drained by wells on No. 1 leases are sending gas to consumers. Nevertheless, the appellee and the court below refused to allow the company to earn any return whatever on the No. 2 leases, although they are delivering gas to consumers. Moreover, the order and judgment below do not allow the Ohio company to include in its operating expenses, as part of the cost of producing and delivering the gas to the appellant, anything for the delay rentals or carrying charges on these No. 2 leases. *The company thus sustains an out-of-pocket loss by reason of its ownership of the No. 2 leases, although the consumers are getting gas therefrom.*

Moreover, the uncontradicted testimony shows that in a considerable number of instances the company is paying to the owners of tracts of land in Class No. 2 well rentals, or royalties, in lieu of delay rentals, although no wells are drilled on such tracts. The appellee makes no finding and says nothing to justify its action in holding that those tracts are not used and useful. There are 6,328 acres in these tracts (Company Exhibit 180; R. 3002) which, at the appellee's own valuation of $25.00 per acre, would amount to $158,000, and at the minimum proved value of $39.37 would amount to $249,133.

We submit that the appellee and the court below, even under the strictest construction as to the meaning of "actually used and useful," should have held that at least all of the leaseholds in Class No. 2 are used and useful in rendering the service in question. There are 164,739 acres of leaseholds in Class No. 2. At the appellee's own inadequate valuation of $25.00 per acre, this would amount to $4,118,475; and at the minimum proved value thereof of $60.00 per acre, would amount to $9,884,340 which should be added to the valuation.

In his dissenting opinion in the Columbus case, Judge Jones said:

> "The disallowance * * * of valuation for the gas reserve leases, which are designated as 'Class No. 2,' is, in my judgment, erroneous. 'Class No. 2' is used and useful as a reasonable reserve gas property, and should have been given a reasonable valuation." (R. 81)

Leaseholds of Classes Nos. 3 and 4

The testimony also shows, and it is uncontradicted, that leaseholds of Classes 3 and 4 are used and useful in that service, that, without leases of Classes 3 and 4 as well as 1 and 2, the Ohio company could not continue to do business, and, in fact, could not have been organized as it exists today. The testimony of Mr. Weymouth on this point is particularly clear and convincing. It may be observed that the chief counsel for the city of Columbus, in the progress or the hearing, stated: "We admit that Mr. Weymouth is a man of very great ability" (R. 1289).

At R. 1378-9, Mr. Weymouth testified as follows:

> "Q. I want now to direct your attention briefly to the question of gas reserves. You have been a manager, an operator; and I wish you would as briefly as possible, yet covering all the necessary points, tell the commission how you go about to establish a gas company? A. The foundation stone of all natural gas companies is of course its supply of natural gas. In order to establish a natural gas company one must first have sufficient gas reserves to seek a market."

At R. 1380, Mr. Weymouth further testified:

> "Q. Would you, as an operator, attempt to establish a company such as The Ohio Fuel Gas Company with its present business limited only to No. 1? A. You couldn't do it; you couldn't make proper representations to the people whom you wished to buy gas from you, neither could you raise any money to build a project of that kind on that basis."

And at R. 1381:

> "Q. And I want to know whether you could successfully operate a gas company without reserves?

A. No, you could not, not at all. I think the—I don't know of any successful natural gas company that does not have large gas reserves and which does not depend upon those reserves.

* * * * * *

Commissioner Geiger: I see, but then you would have to get No. 3 in order to protect No. 2 and No. 4 in order to protect No. 3?

The Witness: Yes, you have to have Numbers 1, 2, 3, and 4 acreage, not only as a matter of protection, but also as a possible source of supply for the continuation of your business."

Mr. Weymouth also testified on this subject at R. 1389 *et seq.* His testimony is very clear and convincing.

At R. 1052-53, Mr. Seyffert testified as follows:

"Q. What has been the history of the natural gas companies in Ohio that did not have sufficient reserves? A. The usual outcome of a great many of the smaller companies who did not fortify themselves with reserves is that they went out of business, either had to sell out or became defunct because of inability to furnish service to the customers and make ends meet.

Q. Well, what is the effect of having only Number 1 on costs, do costs mount? If so, why? A. If we were confined to the use of Number 1 acreage only, we would very shortly run ourselves into very greatly mounting costs on the one hand or else a decided shortage of gas on the other, and it is the latter that would be more likely to occur, because if we were limited to Number 1 acreage, which, as I recall, is some 291,000 acres, and estimates have been made of reserves under that of say approximately 300 billion cubic feet; at the rate that we are now producing, assuming that we could buy gas from

> independents and West Virginia in the same amount that we are now buying, the amount of gas in the ground would only be equivalent to about a ten-year period and if we were not able to buy this gas from other sources, the amount of gas in the ground would only be equivalent to five or six years' supply if we could get it out of the ground in that time, which would be impossible."

Further pertinent testimony by Mr. Seyffert appears in the pages following the above quotation.

Testimony corroborating that of Weymouth and Seyffert and showing that leaseholds of Classes 2, 3 and 4 are used and useful in the business and operations of the Ohio company was given by Dally, R. 1119, 1120, 1121, 1136-7; Wittmer, R. 1182, 1194, 1197, 1199, 1200; Meals, R. 1158, 1165, 1265-66; Webber, R. 1309, 1310, 1312; Roth, R. 1339.

It is inconceivable that property without which a corporation could not be formed or exist is not actually used and useful within the meaning of the law.

Large Reserve Gas Supply Advantageous to Rate Payers

The longer the gas supply which is provided lasts, the less will be the annual rate of amortization. Without attempting an exact calculation, it is apparent that it would be more advantageous to consumers to pay a return upon the reasonable value of reserve leaseholds and the carrying charges thereon, and thus lessen amortization charges, than it would be to pay the greatly increased amortization charges for the entire plant and a return on the lower valuation of leaseholds. For instance, a ten year gas supply means, roughly, a 10 per cent. annual amortization charge

on the value of the entire property, with proper adjustments for salvage, etc. A twenty-five year gas supply means, roughly, a 4 per cent. amortization charge on the same valuation.

The company's testimony on this point is not only uncontradicted, but the city's expert witness Blundon refused to express any opinion as to whether or not leaseholds of Classes 2, 3 and 4 are used and useful, and, when asked if he was competent to say "whether the Ohio Fuel Gas Company needs any reserves other than its No. 1 leaseholds to discharge its obligation to customers in the State of Ohio," expressly admitted, "I am not competent to answer that question at this time" (R. 1416-17).

The meaning of the phrase "actually used and useful," as employed in the Ohio Statutes, is the same as that of "used and useful" as generally understood in the law of utility rate making

This view is entirely consistent with the brief history of the use of the words in the Ohio statutes.

Sections 614-23 and *614-46 G. C.* (102 Ohio Laws 549) provide that the commission shall fix rates with regard to the value of the property "*actually used and useful* for the convenience of the public." *Section 499-8,* enacted later, employs the words "used and useful," and *section 499-9* uses the terms "used and useful," "owned *or* used" and "owned *and* used." These latter two sections, which were adopted at the session of the legislature following that which enacted *sections 614-23* and *614-46* (*103 Ohio Laws 804*), do not use the word "*actually.*" *Section 614-20,* as amended by the *Act approved March 20, 1929* (*113 Ohio*

Laws 17), refers to property "*used and useful* in rendering the service." It is significant that the later statutes omit the word "actually."

It must be presumed that the words "actually used and useful" are employed in the statutes in the same sense in which they were used in the law of utility rate making at the time the statutes were enacted, in the absence of a specific decision by the Supreme Court of Ohio to the contrary. There is no such contrary decision.

Whatever amount of reserve leaseholds is necessary to furnish an adequate supply of gas for a reasonable time in the future, to assure the continuity of the business from the standpoint of the stockholders, as well as to justify municipalities in granting franchises to the utility, and consumers in equipping their premises with gas using appliances, is as actually used and useful for the service and convenience of the public as is any particular acre of ground which has a gas producing well drilled on it. It is the property of the utility, devoted to the public service, from which it derives, and can derive, no other return or benefit. The property being used and useful for the service and convenience of the public, it follows that the utility is entitled to earn a reasonable return upon its present fair value, as well as the delay rentals or other carrying charges which are necessary to hold it.

(5) The determination by the appellee and the court below of the value of Class No. 1 leaseholds at anything less than the minimum value proved by the uncontradicted testimony of competent and credible witnesses was arbitrary, unlawful and confiscatory.

The judgment under review in effect denies to a natural gas utility, so far as gas leaseholds are concerned, the pres-

ent value rule in rate making. The so-called "book value" of the operated leaseholds adopted by the court consists of book entries made pursuant to the rules of accounting prescribed by appellee which prohibit, under severe statutory penalties (G. C., sections 499-14, 614-65, Appendix B, pp. 160, 162), the entering in the capital accounts of anything for the leaseholds except the bare cost thereof. The court adopted the book value rule on the theory that the present market value of the leaseholds was not shown by the evidence. To reach that conclusion it ignored the uncontradicted testimony of competent and credible witnesses. *This utter disregard of uncontradicted evidences of competent and credible witnesses is the principal vice of the order and judgment in this case.*

The question of the valuation of the Ohio Company's gas lands and leaseholds comes into this case in connection with the determination of the reasonableness of the operating expenses of the appellant—that is, the *cost* to the Ohio company of gas delivered at the town gates. The testimony here under consideration was taken in the Columbus case and introduced into this case by stipulation (R. 135).

The Theory, or Basis, of Valuation of Gas Leaseholds

The basis of valuation was the general market value of the gas leaseholds—that is, what they would sell for in the open market between a willing buyer and a willing seller. The proof consisted in the opinions of witnesses as to such value, and was supplemented by the actual selling prices of similar properties in a number of transactions.

The witnesses testified to the value of the leasehold estates only—that is, the gas rights in the premises, so to

speak, under the various types of leases or instruments of title—not including the value of the wells as such (Gas Well Construction, Account No. 211) or the equipment (Gas Well Equipment, Account No. 212). The witnesses did not testify as to the value of gas in the ground, and no attempt was made to value the leaseholds by a calculation of the present worth of estimated profits, from the production and sale of gas from the premises.

Classification of Leaseholds

The Ohio company owns approximately 2,834,187 acres of gas leaseholds scattered throughout the gas producing areas of the state of Ohio. The leaseholds are situated in 37 different counties, from Lake Erie to the Ohio river, and from the central part of the state east and southeast approximately to the Pennsylvania and West Virginia state lines. The company made a classification of its leaseholds into four classes, substantially as follows:

CLASS 1 Leases of tracts of land having producing gas wells drilled thereon from which gas is being furnished to the public. There are 291,396 acres in this class.

CLASS 2 Leases of tracts of land proved by actual developments and operations in the immediate vicinity thereof to be good gas-producing lands, but which do not have any producing wells drilled thereon. There are 164,739 acres in this class.

CLASS 3 Leases of tracts of land shown by surrounding or neighboring developments or operations, geological considerations, etc., to be reasonably certain to be good gas lands, at least as to large portions thereof, but not yet demonstrated to be

such by actual drilling. There are 312,631 acres in this class.

CLASS 4. Leases of tracts of land situate within the areas of territory where gas sands are known or assumed to exist from general geological conditions, but which are so remote from actual gas-producing wells or territory that they are merely prospective gas lands. There are 2,065,421 acres in this class.

This classification was made for convenience, and the terms "first class", "second class", etc., have no reference to the usefulness or value of the leases.

Exhibits Pertinent to Gas Lands and Leaseholds

Elaborate exhibits, showing in the utmost detail, all the facts pertinent to the character and history of the leases, wells thereon, etc., were furnished to the witnesses and put in evidence. The volumes containing these data are Company Exhibits Nos. 141, 142, 143, 144, 145, 146, 147, 148 and 149, which are explained at R. 1321-1328. Maps of the gas producing fields of the state, being Company Exhibits 151, 152, 153, 154 and 155, were also furnished to the witnesses and put in evidence. These are explained at R. 1334, *et seq.* *These exhibits show not only the location, etc. of each particular lease, but the location, history and characteristics of each particular well.* The maps show not only the wells drilled on the company's own leaseholds, but also all other wells in the vicinity.

Cross-examination of the witnesses established that the exhibits furnished to the witnesses were complete for the purpose, and that a prospective purchaser would not need or expect any more information than was contained therein.

Qualifications of Leasehold Witnesses.

A. B. Dally, Jr.—Mr. Dally is a resident of Pittsburgh, Pennsylvania; for more than 35 years he has been engaged in the natural gas and oil business, is associated with the Benedum-Trees interests and is president of the Penn-Ohio Gas Company, president and general manager of the South Hills Oil & Gas Company, vice president of the Plymouth Oil Company, vice president and director of the Big Lake Oil Company, director of the Arkansas Natural Gas Company and of the Arkansas Fuel Oil Company, which are the principal companies with which he is associated (R. 346). Of the companies mentioned, only the Arkansas Natural Gas Company does a public utility business (R. 348); the Penn-Ohio Company is an operating company in the state of Ohio and owns gas territory in 15 or 16 counties of the state, owning approximately 60,000 acres or more of gas leaseholds (R. 347). The Arkansas Natural Gas Company operates as a utility in Arkansas, Texas and Louisiana (R. 349). For 35 years Mr. Dally has bought and sold natural gas properties in the state of Ohio and elsewhere. Practically all the natural gas activities in which he has been engaged have been outside the public service. He has had recent experience in the purchase and sale of large natural gas producing properties in Ohio, and is well acquainted with the market for and market value of such properties. Mr. Dally, as shown by the record, is a man of very extensive experience with intimate acquaintance with the business. He is in no manner connected with the Ohio company, and is not a professional or paid witness.

2. George Wittmer, Jr.—Mr. Wittmer is a resident of Pittsburgh, and has been engaged in the natural gas busi-

ness since 1895; he is connected with the American Natural Gas Company, the Wittmer Company, and the Wittmer Oil & Gas Properties. The latter has approximately 250,000 acres of gas leaseholds, about 100,000 of which are in the state of Ohio (R. 350). Mr. Wittmer has bought and sold gas properties in the state of Ohio, having recently been concerned in the sale of more than 100,000 acres, part of which had producing wells thereon, etc.; he was also concerned in several other purchases or sales of gas producing lands and leaseholds (R. 351-54).

3. Samuel W. Meals—Mr. Meals is a resident of Pittsburgh and has been engaged in the natural gas business for over 40 years. He is president of the Carnegie Natural Gas Company. The business of that company is chiefly supplying industrial plants of the United States Steel Corporation, but it has some domestic business in connection therewith. The business of the Carnegie Natural Gas Company is almost wholly outside the public service. It handles as much gas as the Ohio company. Mr. Meals for a long time has been interested in the natural gas producing business in the state of Ohio and keeps in active touch with it. As is plain from the record, he is one of the leading natural gas men of the United States (R. 355-58).

4. Daniel S. Webber—Mr. Webber is a resident of Columbus, Ohio, and is engaged in the business of buying and selling gas and oil properties. He is not connected with any gas company but is in business for himself and has been since 1927. Prior to that year, he was with the Ohio Fuel Supply Company for 15 years and prior to that was with various companies in Pennsylvania, West Virginia and New York. As appears by his testimony, Mr. Webber is intimately acquainted with the natural gas business in

Ohio, and particularly with the properties of the Ohio company (R. 359-60).

5. JOHN E. KELLEY—Mr. Kelley testified regarding the market value of natural gas leaseholds, particularly in the state of West Virginia. He is an engineer by profession and has been engaged in the natural gas business, particularly in the purchase of developed producing properties, since 1923. Mr. Kelley has purchased gas lands and leaseholds in the states of West Virginia, Pennsylvania, Kentucky, Texas and Oklahoma, in the last several years, in excess of 400,000 acres, and has leased more than 80,000 acres in the state of West Virginia, and bought more than 100 such properties in that state. Mr. Kelley did not testify directly as to the value of natural gas lands and leaseholds in Ohio; but his testimony shows the existence of a general market for such properties, and bears indirectly upon the values of such properties in Ohio (R. 362-3).

Order of Examination of Witnesses

It will be observed that the examination of the witnesses on the value of gas lands and leaseholds in Ohio is begun by *cross-examination* by the *city's* counsel. The witnesses had not been examined previously and they were not officers or agents of any company involved in the case. The Columbus company, in justifying the price which it paid to the Ohio company for gas at the city gate, had introduced in evidence certain records of the Ohio company showing the value of its property. Among these records were valuations of the Ohio company's gas lands and leaseholds, made by these witnesses. The witnesses were produced by the Columbus company and cross-examined by the city's counsel as to these valuations. Hence the order in which the examination occurred.

(6) Proved Values of Leaseholds

(Company Exhibit 44, R. 2907, 2910-11)

	Class No. 1	Class No. 2	Class No. 3	Class No. 4	Total
Number of Acres	291,396	164,739	312,631	2,065,421	2,834,187
A. B. Dally, Jr. (R. 3056)	$26,225,640	$16,473,900	$ 6,252,620	$ 4,130,842	$53,083,002
S. W. Meals (R. 3205)	17,483,760	9,884,340	1,250,524	8,261,684	36,880,308
Geo. Wittmer, Jr. (R. 3231, 3161, 3163)	21,825,000	12,300,000	3,120,000	6,195,000	43,440,000
D. S. Webber (R. 1276-7)	11,473,717	10,440,300	10,504,320	6,196,263	38,614,600
Average of four valuations	$19,252,029	$12,274,635	$ 5,281,866	$ 6,195,947	$43,004,477
Minimum value of each class	$11,473,717	$ 9,884,340	$ 1,250,524	$ 4,130,842	$26,739,423

	Class No. 1	Class No. 2	Class No. 3	Class No. 4	Average
A. B. Dally, Jr.	$90.00	$100.00	$20.00	$2.00	$18.73
S. W. Meals	*60.00	*60.00	**4.00	**4.00	13.01
Geo. Wittmer, Jr.	74.90	74.66	9.98	3.00	15.33
D. S. Webber	39.37	63.37	33.60	3.00	13.62
Average of four valuations	$66.07	$ 74.51	$16.89	$3.00	$15.17

* Meals, in his valuation, combined Classes 1 and 2;
** Meals, in his valuation, combined Classes 3 and 4.

Appellee's Valuation of No. 1 Leaseholds is $4,188,817 Less Than Lowest Proved Value Thereof

The discussion of the question of the valuation of the leaseholds appears in the opinion of the court below in 127 O. S., 122-124 (R. 69-70).

That the appellee's method of valuing No. 1 leaseholds at $25.00 per acre was an error is established by the decision of the court below, which reversed it. It was reversed because it was based on a valuation of leaseholds made in the Logan Gas Company case *and not on any evidence in this case.* Consequently (regardless of the court's own error as to book value), that valuation is out of the case. As there was competent evidence of a substantially higher value of No. 1 leaseholds, the court below should either have fixed the value of said properties in accordance with that evidence, or have remanded the case to the appellee, with instructions to do so.

The testimony on this subject was given by the following witnesses: Dally, R. 1065-1147; Wittmer, R. 1147-1212; Meals, R. 1212-1267; Webber, R. 1267-1318.

That there was *clear and convincing* evidence of a value of No. 1 leaseholds in excess of $25.00 per acre is; we submit, shown by the testimony, some pertinent extracts from which are set forth in Appendix A hereto.

Judge Jones, in his dissenting opinion in the Columbus case, describes the testimony of these gas leasehold witnesses as "*overwhelming expert testimony establishing higher values*" (R. 81-82).

The lowest value of No. 1 leaseholds testified to by any witness was $11,473,717, which is equivalent to $39.37 per acre. Appellee and the court below had the right to adopt

this valuation, if they saw fit, but the testimony being uncontradicted and coming from witnesses whose competency and credibility were not questioned, a lower valuation could not be used without confiscation. Appellee's valuation at $25.00 per acre amounted to $7,284,900 for these properties, which is $4,188,817 less than the minimum it could lawfully adopt under the evidence.

The *Logan Gas Company cases* (121 O. S. 507, and 124 O. S. 248), cited by the appellee and court below, involve the *valuation* of the company's property, which, under the Ohio statutes, may be appealed to the state supreme court before rates are fixed by the public utilities commission. The value of No. 1 leaseholds was fixed at $25.00 per acre because that value appeared in the books and records of the company. *No rates have yet been fixed in that case;* the matter is still pending before the commission. Consequently, there has been no chance to raise the question of confiscation in the case. The fact is that the determinations of value, etc., in that case is almost as bad as in this case, but we are not here concerned with the judgment or findings therein.

The court's holding that "No valuation can be based upon market price because of the fact that there is no market for a gas property so extensive as that of the Ohio Fuel Gas Company" (R. 69) is based on no evidence and is contrary to uncontradicted, competent and credible testimony.

The only reason stated by the court below for rejecting the evidence of the market value of the leaseholds is that quoted above. The court does not discuss the evidence it rejects, and there is no pretense in its opinion that this holding is based on any evidence.

The question is of such vital importance, and is so distinctively one of *what the evidence is*, that it seems desirable to quote in this brief some pertinent extracts from the testimony, so that the court may find them in one place, instead of looking up numerous places in the record. Consequently, some extracts from the testimony on this precise point and some other kindred questions are printed in an appendix hereto (Appendix A, p. 139).

The holding of the court below disregards the specific testimony of, *e. g.*, Meals that "there was a market for acreage (leaseholds) of that amount at that time"; of Dally, that there is a market for such natural gas properties, and that if the leaseholds in question had been for sale on June 30, 1929, there would have been willing buyers therefor; of Webber, that if the leaseholds, the total amount, were offered for sale at the valuation which he put on them, willing buyers would have been found for them at his valuation, without any doubt, and that prospective purchasers, in 1929, were looking for large quantities of leaseholds and of Wittmer, that if the Ohio Company had wanted to sell the leaseholds, in his judgment there is no question but that they could have been sold, at the time in question, at the valuation he put on them, and that a large area of leaseholds would be considered much more favorably by prospective buyers than a smaller amount.

Inasmuch as the appellee and the court below held that only leaseholds of Class No. 1 were used and useful and entitled to have the value thereof included in the rate base, it necessarily follows that the court's holding that there could be no market for leaseholds so extensive as those of the Ohio Fuel Gas Company, to have any perti-

nency to this case, must be held to refer to Class No. 1 leaseholds.

The lowest valuation of the 291,396 acres of Class No. 1 leaseholds testified to by any witness was $11,473,717. It is strange to have the court decide so vital a question on the arbitrary assumption that there could be no market for gas producing properties having a value of $11,473,717, when the appellee and court below found that the properties of the same company, other than leaseholds, which necessarily depend for their life upon the producing property, had a value of $67,253,380 (R. 179).

The Appellate Division, Third Department, of the Supreme Court of New York, to which appeals from the Public Service Commission of that state are taken, found no difficulty in accepting a valuation of $12,000,000 for a very much smaller acreage of gas producing property (132,000 acres, maximum), and twice reversing the public service commission of that state for trying to evade it (*People ex rel. Pennsylvania Gas Company* v. *Public Service Commission*, 198 N. Y. S. 193, 195; *Pennsylvania Gas Company* v. *Public Service Commission of New York*, 207 N. Y. S. 599, 605, 606); and the Supreme Court of Pennsylvania reversed the public service commission and superior court of that state for rejecting a similar valuation (minimum $11,212,000) for the same property (*Erie* v. *Public Service Commission*, 278 Pa. St. 512, 518, 526-527). It is significant that the valuation approved by the courts of two states, as mentioned in this paragraph, included a minimum valuation of $7,212,000 for a tract of 12,000 acres of old, settled, gas producing property.

The book value of all the leaseholds of the Ohio Fuel Gas Company, containing 2,834,187 acres, amounts to only

$8,478,280 (R. 999). The record does not specifically show the book value of leases of Class No. 1, but the city introduced an exhibit, No. 86 (R. 3165), purporting to show that the cost, or book value, of No. 1 leaseholds was $1,569,479. To say that, in June, 1929, because of their magnitude, there could be no general market for gas leaseholds having such a relatively small value, is to ignore the commonly known facts of the natural gas industry as well as the evidence in this case. The evidence shows that the leaseholds known as the Brendel properties, containing only 21,000 acres, situate in Ohio, were sold, in 1929, for $2,500,000 (R. 1253-54). This is more than the book value of the entire 291,396 acres of Class No. 1 leaseholds of the Ohio company. These facts show the position of the court below on this subject borders on the absurd.

The assumption by the appellee and court below that the leasehold values proved were calculated values dependent upon utility rates, etc., is contrary to the evidence.

The court below, apparently considering it as a reason for disregarding the testimony as to the market value of the leaseholds, says it was held in *United Fuel Gas Co.* v. *Railroad Commission of Kentucky*, 13 F. (2d) 510 (affirmed by this Court), that—

> "for rate base purposes, gas acreage belonging to a natural gas company should be valued at its book value rather than on the basis of its earning capacity. The court adverts to the fallacy of the argument that because of the earning capacity and large return allowed, the property has greatly increased in value, and that such increased value should thereupon be taken as the basis of another calculation of a still larger return" (R. 70).

This statement begs the entire question. It is based on two erroneous assumptions of fact: (1) that the leasehold values proved in this case were *calculated* values, based on estimated profits from the production and sale of estimated quantities of gas in the ground, at assumed prices, such as were rejected in the United Fuel Gas Company cases, and (2) that the valuations proved were dependent upon earnings in the public service. Both assumptions are contrary to the evidence. The court below does not discuss or cite any testimony tending to support these assumptions, and there is no pretense in the opinion that the record contains any such testimony.

The court below fails absolutely to distinguish between considering, in a general way, the earning capacity of property in forming an opinion as to its market value, and calculating a so-called value on the basis of estimated profits from the production and sale of gas, at assumed prices, and treating such estimated profits as the measure of value. Persistently, not only the city's counsel, but at least one of the commissioners, tried to get the witnesses to say that they had determined the valuations to which they testified by such calculations of profits—that is, to maneuver them into the position of saying that their valuations were determined in the way that was rejected by this Court in the *United Fuel Gas Company cases,* or to say that they valued the gas in the ground, and not the leaseholds; and the witnesses, in answer to such questions, had to state, over and over again, that they did not make such calculations and did not determine their valuations in that manner, but testified to the general market value of the leaseholds, that is, the prices for which they would sell in the open market between willing buyers and willing sellers. (Some-

times the witnesses, counsel and commissioners, said "acreage," or "territory," instead of leaseholds, but the testimony explicitly shows that the witnesses valued the leaseholds as such.)

As previously stated, this question is so distinctively one of what the evidence shows that pertinent extracts from the testimony are included in Appendix A. Brief mention may be made here of some of the answers given by the witnesses. Meals said: "I did not make any calculations of that kind. * * * I told you I did not make an estimate; I did not use that"; Wittmer, in answer to the question "What figure did the price for which gas sells have to do with your valuation," answered, "None whatever." The other witnesses testified to the same effect.

We confidently submit the testimony is *clear and convincing* that the witnesses did not base the values to which they testified on an estimate or calculation of profits; that the valuations were not based upon earnings or rates realized in the public service, or due to any consideration of that service; but were the general market values of the premises in the open market—that is, what the premises would sell for in transactions between willing buyers and willing sellers.

In valuing any mining property—coal lands, for instance—competent persons take into consideration the thickness of the vein of coal, the nearness to market, the price of coal, the cost of mining, etc., together with their knowledge of selling prices of similar properties in the vicinity in such transactions as have occurred, *and then form their opinions as to what the general market value of that coal land is. That is precisely what the witnesses in this case did with the gas leaseholds.*

Same testimony would be sufficient in condemnation case

If the State of Ohio had decided to supply gas to its citizens and had condemned these leaseholds, or had authorized municipalities or private corporations to condemn them—or if the Ohio company, under proper authority had acquired them by condemnation, developed as they are—there can be no serious doubt that, in eminent domain proceedings, the testimony introduced in this case would be sufficient on which to determine the compensation to the owners of the leaseholds. There is no legal reason why a different kind or degree of proof should be required in a rate case. Utility property, though subject to regulation, is still private property and entitled to the same constitutional protection of its value as the property of other private owners. Evidence which would be sufficient against the company must be sufficient when in its favor.

Appellee holds erroneous view that gas leaseholds cannot be valued

The findings of the appellee are honeycombed with errors of law and fact which lead directly to its rejection of the testimony as to the value of the leaseholds. The following are a few of them not heretofore mentioned.

In its opinion in the Columbus case the appellee said:

> "Manifestly the present value depends upon the quantity of gas below the surface" (R. 150).
>
> "It is impossible to estimate the gas content of any acreage or the life of its productivity." (R. 151).

Inasmuch as the foregoing findings show it to be the appellee's view that the value of the leaseholds depends upon a fact which it is impossible to determine, it necessarily results that in its opinion the present value of the

leaseholds can not be determined. This is probably the reason why it refused to find the value of the leaseholds under the evidence in this case and fell back on the valuation of $25.00 per acre for Class No. 1 leases because the Supreme Court of Ohio had approved that valuation in the Logan Gas Company case.

In *Ithaca Trust Co.* v. *United States*, 279 U. S. 151, 155, Mr. Justice Holmes, delivering the opinion of this Court, said:

> "But the value of property at a given time depends upon the relative intensity of the social desire for it at that time, expressed in the money that it would bring in the market. See International Harvester Co. *v.* Kentucky, 234 U. S. 216, 222. Like all values, as the word is used by the law, it depends largely on more or less certain prophecies of the future; *and the value is no less real at that time if later the prophecy turns out false than when it comes out true.*"

Regardless of its holding that "*it is impossible to estimate* the gas content of any acreage or *the life of its productivity,*" the appellee definitely held that:

> "The average life of gas-bearing lands in Ohio is seven and one-half years" (R. 154).
>
> * * * * * *
>
> "Considering the present condition of these wells the remaining life expectancy is an average of three years and two months" (R. 158).

These patent inconsistencies are not pointed out merely for the purpose of showing absurdities in the appellee's determination of this case; these matters, it is submitted, go to the very basis of its decision of this question. A careful consideration of the appellee's opinion in this con-

nection, and of the numerous questions put by the appellee to the witnesses on the value of the leaseholds, warrants the conclusion that it is really the opinion of the appellee that no proper value can be determined for gas lands and leaseholds—a view which fits in with its arbitrary disregard of competent and credible testimony.

In this connection, the following language of the Supreme Court of Pennsylvania in the *Pennsylvania Gas Company* case, 278 Pa. St. 512, at 526-527, is pertinent:

> "It is no longer doubtful among those familiar with the business, whether expert geologists or engineers or practical gas-producing men, that the remaining life of the fields can be determined with reasonable accuracy—with as much accuracy as is used in dealing with ordinary affairs of life."

The Assumption of Monopoly is Directly Contrary to the Evidence

In its opinion, the appellee said:

> "We are at once confronted with the question of the probative value of evidence touching the market value. Such evidence could not be based upon the price between a willing buyer and a willing seller. In the very nature of the operation, companies have a monopoly within their own field" (R. 150).

The appellee does not say where it got the idea that, "*in the very nature of the operation,* companies have a monopoly within their own field." Certainly it did not get it from the evidence. It does not pretend to say what makes 291,396 acres of gas producing lands a monopoly of all the gas lands in the state of Ohio. Because a gas company sometimes has a monopoly in a municapility or town in which it delivers gas to consumers, the appellee

erroneously assumes that the same condition must exist in the fields of production—a very different situation. The testimony of the witnesses explicitly shows that the Ohio company does not have a monopoly in its fields of operation.

At R. 1180, Mr. Wittmer testified as follows:

> "Q. (by Commissioner Geiger) That is right; now I have got you. The idea you have in mind is this, by reason of the fact that this company is able to go in and secure all gas producing lands and hold it under a lease, gave them a value that didn't exist before the leases were put upon that land, the fact that they are put under lease and held together by one company enhances the value to $75 an acre where it is just one lease? A. No, that is—" (Interrupted by the commissioner).

Again, at R. 1180, Wittmer testified:

> "Q. Well, now, assuming that that were true; at some time in the past a lease was made by the land owner to a gas company or to somebody gathering these leases for the purpose of selling them to the gas companies, and they were leased for $1.00 an acre, and an agreement to get $200 a gas well. Now, confining your operation to what you say now is worth $75 an acre, wherein has that spread between what they paid the land owner for the lease and what you now estimate to be its value; has that come from the fact that the gas company has gotten under lease all available gas lands and there is no more to be secured? A. Oh, no, no."

And at R. 1211:

> "Q. (By Mr. Turner) There is one question I would like to ask this witness before he goes home

I want to ask you whether or not the Ohio Fuel Gas Company controls all of the gas territory in this belt across the state here as indicated on this map, or whether there is any competition there with them? A. It is competitive. So far as I know it is entirely open; many different companies, individuals and companies are operating through that territory.

Q. I want to develop whether or not the Ohio Fuel Gas Company has a monopoly of the gas in that territory? A. Oh, no."

Mr. Dally (R. 1130) testified that there are possibly four or five hundred gas companies operating in Ohio; Meals testified (R. 1247-48) that "other companies" and "quite a number of independent operators" own leaseholds in the same fields as those of the Ohio company; and Webber (R. 1307) shows that many other companies and individuals own leaseholds in the same fields. These are only a few of the instances showing that the Ohio company does not have a monopoly in the gas fields. These witnesses are among the very best natural gas men in the world. If their testimony can be wiped out by mere *ipse dixit* to the contrary, there is not much use in spending time and money in introducing testimony in rate cases.

Particular sales and selling prices of large acreage of natural gas leaseholds, in Ohio, were proved, and more than justified the leasehold valuations claimed in this case.

The record contains numerous references to particular sales of gas leaseholds, with the selling prices thereof. The following references to the testimony are pertinent:

In 1929 Mr. Wittmer sold 101,600 acres of leaseholds (consisting of 4,000 acres of Class No. 1, about 4,600 acres of Class No. 2 and 93,000 acres of Class No. 3), for

$1,200,000, which included $115,000 for the wells thereon. After deducting the price of the wells from the purchase price, the amounts received per acre for the leaseholds of the various classes were as follows: Class No. 1, $150; Class No. 2, $20; Class No. 3, $3 (R. 1189-1193). In another transaction, he bought 7,000 acres in Muskingum county for $100,000. This was practically undeveloped territory, except 50 acres. The purchase price of this was about $15 an acre (R. 1189-90). Summarizing the amount of leaseholds he had bought or sold in the last few years, the witness said: "60,000 acres to the Philadelphia company; 101,000 acres in the Penn-Ohio; 7,000 acres in Muskingum, 5,300 acres in Vinton," total 173,300 acres (R. 1207).

Mr. Meals testified concerning a sale of 21,000 acres of natural gas leaseholds in the state of Ohio, in 1929, for about $2,500,000, in addition to the value of the wells and equipment. This was the Brendel property. The most of this territory was in Class No. 2 (R. 1252-54). At R. 1265, Meals testified that other people offered more money for this property than Brendel got for it, but he wanted to deal with the interests to whom he sold and let them have it.

Mr. Dally testified that he had bought leaseholds and paid anywhere from $2 to $50, $75 an acre for them; that the $2 an acre would be for Class No. 4; that the $50 an acre territory would be "in close to developments" (R. 1106). Concerning the same sale of approximately 100,000 acres which Mr. Wittmer described, Dally said:

> "We bought the property and I think the average price would be between $75 and $80 an acre" (R. 1130).

He further testified concerning this transaction at R. 1142; and the Brendel sale at R. 1129.

In practically all instances in which the selling prices, in actual transactions of purchase anl sale, were mentioned by the witnesses, the selling prices of operated leaseholds, which correspond with Class No. 1 leaseholds in this case, were higher than the average values per acre testified to in this case.

The Same Kind of Testimony Has Been Approved in Numerous Natural Gas Rate Cases

It is hard to understand why the commission and courts of Ohio find difficulty in approving the kind of testimony introduced in this case. It has been approved by courts and commissions in a number of other jurisdictions.

Erie v. *Public Service Commission,* 278 Pa. St. 512, at 525-527;

Borough of Ridgway v. *Ridgway Light & Heat Company,* 12 Pa. C. R. 305 (Pennsylvania Public Service Commission);

Pittsburgh, et al. v. *Peoples Natural Gas Company,* P. U. R. 1929B, 526, decided November 20, 1928, rehearing denied April 16, 1929, P. U. R. 1929 C, 460 (Pennsylvania Public Service Commission);

People ex rel. Pennsylvania Gas Co. v. *Public Service Commission of New York,* 198 N. Y. S. 193;

Pennsylvania Gas Co. v. *Public Service Commission of State of New York,* 207 N. Y. S. 599, 605; 606, 608;

Wheeling v. *Natural Gas Co. of W. Va.*, P. U. R. 1933D, 1 (West Virginia Public Service Commission). This case contains a good discussion of the subject at pages 33 to 45;

Erie et al. v. *Pennsylvania Gas Company*, 22 Pa. C. R. 232 (not yet reported in P. U. R.), decided April 4, 1933 (Pennsylvania Public Service Commission);

Grove City, et al. v. *Union Heat & Light Company*, 22 Pa. C. R. 216 (not yet reported in P. U. R.), decided February 28, 1933 (Pennsylvania Public Service Commission).

In *American Indian Oil & Gas Co.* v. *Poteau*, 108 Okla. 215, 235 Pac. 906, the Supreme Court of Oklahoma held that:

> "The value of gas lands for rate-making purposes is not the sale price of a cubic foot of gas as applied to the supposed quantity in a given field, but the reasonable market value of the whole tract or tracts, from which the gas is produced." (Syllabus)

In delivering the opinion of the court, Mr. Justice Phelps said:

> "We can conceive of no better rule by which to fix the present value of the production system for rate-making purposes than to take its reasonable market value." (*Id.* 908)

In *Pennsylvania Gas Co.* v. *Public Service Commission of State of New York*, *supra*, the court, referring to the same general character of testimony, held:

> "Evidence *held* to show that Public Service Commission, in fixing base rate for gas company, accepted theory of former commission, which was

annulled on former appeal, without according any weight to scientific data and testimony produced by competent and uncontradicted witnesses as to present market values of gas lands." (Syllabus)

Not Necessary to Consider Blundon's Testimony

It is unnecessary to discuss the alleged valuation or reproduction cost, of No. 1 leaseholds, submitted by the city. That alleged valuation was made on behalf of the city by its witness, Blundon, who expressly admitted:

> "the amount that I included in leaseholds was an arbitrary value of $5.00 per acre for the No. 1 leaseholds"

and twice repeated the same answer in substance at R. 1416-17; and further said:

> "I have included in my report $1,459,010.00 for leaseholds and explained that this was at the rate of $5.00 per acre for the No. 1 acreage,"

then added:

> "The additional explanation that I was not fixing a value for those leases, but had included it as an arbitrary price * * *" (R. 4515).

(7) If, as the appellee and court below held, there could be no market for so large an amount of leaseholds as the Ohio company owns, they should have followed the universally recognized rule that, in the absence of a general market or general market value, the opinions of qualified witnesses are always competent and sufficient to establish value; and should have fixed the value of the leaseholds in accordance with the evidence.

The position of the appellee and court below was not that the leaseholds did not have large value, but, because

of their extent, there could be no general market for them, and, consequently, they could not be valued on the market value basis.

Assuming for the purpose of this argument only that this is true, the value, nevertheless, inheres in the property, and it was the duty of the appellee and court below to determine that value. Mere difficulty in doing so does not justify them in depriving the property owner of the benefit of the value of its property.

This court has frequently held, and it appears to be the universal rule, that whenever the circumstances of a particular case are such that no general market value for the property in question can be shown, its value may be established by the opinions of competent witnesses as to the value of the property under the peculiar circumstances. This rule, we submit, is a complete answer to the contention that, under the circumstances, no general market value of the leaseholds could be shown. The company cannot be denied the benefit of its ownership of this property merely because it has so much of it, and because the state authorities find difficulty in applying the market value rule. The judgment of the court below ignores the existence of this rule and this class of testimony, but gives no reason for doing so.

The established rule is stated in the following authorities:

In *3 Chamberlayne on Modern Law of Evidence,* it is said:

> "*Absence of Market Value.*—Should it be claimed that there is no market value for a given commodity or piece of land, it will be sufficient in order to let in other evidence, that the Court should be satis-

fied that there is in fact no market value. (Section 2099 a)

Proof by Estimate.—Where no relevant market value can fairly be claimed to exist, the administrative situation is materially altered. Reliance must, in most cases, be placed upon the inference or estimate of witnesses applying the standard of money to the subject-matter in hand. * * * The estimate of any duly qualified witness is, therefore, received in most instances where no market value can be assumed to exist. (Section 2099 i)

The estimate of such a witness is frequently the only practical expedient open to judicial administration in cases where the real estate has no market price." (Section 2130)

In *1 Wigmore on Evidence* (2nd Edition), Section 717, it is said:

"But not always is there a market value for an article. In such a case the value is the probable exchangeable rate so far as one can estimate it from the various attendant circumstances and conditions which would affect the disposal of the article; and it is with these that a witness must in such a case be familiar."

In *Rhodes* v. *Baird,* 16 O. S. 573, it was held:

"To the extent that the damages depended on the loss of the use of the property for the term, its market value at the time of the eviction subject to the performance of the contract on the part of the plaintiff, furnished the standard for assessing the damages. *If it had no general market value, its value should be ascertained from witnesses whose skill and experience enabled them to testify directly to such value in view of the hazards and chances of the busi-*

ness to which the land was to be devoted." (Syllabus.)

Brooks-Scanlon Corp. v. *United States*, 265 U. S. 106, 123;

Standard Oil Co. v. *Southern Pacific Co.*, 268 U. S. 146, fourth syllabus and opinion at pages 155-156;

Sinclair Refining Co. v. *Jenkins Petroleum Process Co.*, 289 U. S. 689.

It would be unreasonable and unlawful to set up a standard of proof which would exclude the only proof of which the subject matter is susceptible.

Montana Railway Co. v. *Warren*, 137 U. S. 348;

Kansas City So. Ry. v. *Interstate Commerce Commission*, 252 U. S. 178;

Burckhardt v. *Burckhardt*, 42 O. S. 474;

Appeal of Pennsylvania Co. for Insurance, etc., 282 Pa. St. 69;

City of Kennett v. *Katz Const. Co.*, 273 Mo. 279, 202 S. W. 558, 562.

The foregoing authorities show that the opinions of the gas leasehold witnesses as to the fact of the value of said properties is competent and sufficient to establish that value, even if it should be held that no general market exists for said properties.

(3) The holding that Class No. 1 leaseholds can be valued only at their "book value" means that their cost must be used in lieu of their present value and is confiscatory.

The court below said:

> "In the case of *Logan Gas Co.* v. *Public Utilities Commission*, 124 Ohio St. 248, 177 N. E. 587, this court in a *per curiam* opinion sustained the commission in basing its valuation of class No. 1 leaseholds (producing) under Section 499-9, General Code, upon book value *and not upon market value.* Because the valuation found in the *Logan Gas Company* case was $25 per acre, both the majority and the minority of the commission in this case fixed a valuation upon class No. 1 leaseholds (producing) of $25 per acre, it being conceded in each finding that this valuation is approximately $2,500,000 more than the present book value of all leaseholds of the Ohio Fuel Gas Company and the Logan Gas Company combined, eliminating, as stated in the minority opinion, the 'arbitrary write up' of approximately $3,700,000 in the Logan Gas Company's leaseholds made during 1919." (127 O. S. 122; R. 69-70)

The holding of the court below that the Ohio company's No. 1 leaseholds can be included in the rate base at only the "*book value*" thereof is nothing but a reversion to the old familiar "*original cost*" theory, thinly disguised. There is no evidence that there was any "*write up*" on the books of the Ohio company of the value of its leaseholds. The so-called "*arbitrary write up*" to which the court refers was made *on the books of the Logan Company, in 1919.* Consequently, there can be no pretense that the "*write up*" in any manner affected the leases of the Ohio company which it did not acquire from the Logan company.

The testimony of Mr. Seyffert (R. 1033-34) shows that when the Ohio company obtained the properties of the Logan company, it acquired 115,923 acres of operated, or Class No. 1 leaseholds, but the write up could not possibly apply to 115,923 acres of the Ohio company's No. 1 leases. The Logan company, on December 31, 1924, had 75,531 acres of operated leases (P. U. R. 1929A, 232). City's Exhibit 50-A shows that from December 31, 1924, the date of the valuation in the *Logan* case, to December 31, 1929, 19,237 acres of operated leases of the Logan company had been transferred or abandoned and that 35,446 acres had been added to the operated leases from the unoperated leases of the Logan company. Consequently, 91,750 acres of the Ohio company's Class No. 1 leases is the maximum to which the alleged *"arbitrary write up"* could possibly apply, and the remainder, 199,646 acres, would have to be valued, under the judgment of the court, at the bare cost thereof. This is so because the rules of accounting prescribed by the appellee for natural gas utilities (Appendix C, p. 170) prohibit a natural gas company, under severe statutory penalty (Appendix B, p. 162) from entering in its capital accounts anything expect the *cost* of its leaseholds. In other words, except as to the properties acquired from the Logan company, the leaseholds of the Ohio company must be valued in the way that the court below held to be erroneous in the first *Logan* case and under identically the same kind of testimony. There is no escape from this conclusion.

It will be observed that the *"arbitrary write up"* of the Logan company's leases occurred in 1919, before the appellee's rules of accounting became effective, on January 1, 1921 (Appendix C, p. 169), and applied to lease-

holds of all classes and not merely to Class No. 1, or operated, leases. Doubtless, this so-called *"arbitrary write up"* was intended to reflect, in part at least, the increase in value of the Logan company's leaseholds due to the discovery of gas thereon. Most of such leaseholds were acquired for merely nominal money considerations. There was nothing wrong in increasing the book value of such properties at the time it was done. In fact, the present General Corporation Act of Ohio clearly recognizes the right of an Ohio corporation to record, from time to time, upon its books, any increase in the value of its fixed assets (Section 8623-38 G. C.; Appendix B, p. 167). Stigmatizing the Logan company's increase in the book value of its assets as an *"arbitrary write up"* is only one of the many ill-considered statements in this record which, without reason, tend to discredit the Ohio company and to impeach the good faith of its officers.

The holding of the court below that only the book value of the No. 1 leaseholds can be included in the rate base deprives the company and its stockholders of all of the benefit and advantage accruing from the discovery of gas and transfers it all to consumers. The record shows that the great bulk of the Ohio company's leaseholds were acquired for a merely nominal consideration, and it is a matter of common knowledge that this is true of natural gas producing companies generally.

The Ohio company has at least 2,163,711 acres of leaseholds which were not acquired from the Logan company, the so-called book value of which was $2,234,570 (R. 1034), practically $1.00 an acre for leases of all classes. Under the evidence only about 1/10 of the leases taken up prove to be good gas producing territory (R. 1380). The company

acquires a lease of, say, 100 acres, in new territory, for a nominal consideration. It carries the lease along for a few years, paying delay rentals in the meantime and finally drills a well on it, gets a dry hole and surrenders the lease. It does that several times, at the expense of paying the carrying charges during the years the several leases are carried and the cost of drilling the several dry holes. Finally, on another such lease, it gets a large well, producing, say, ten million cubic feet of gas a day. The lease then becomes operated and would go into Class No. 1 in the classification used in this case. Its cost, $100, would then go into the fixed capital account. *Under severe statutory penalty, nothing whatever could be added to that nominal cost in the fixed capital account for the value unquestionably inhering in the leasehold because of the discovery of gas thereon.*

As everybody knows, such a gas leasehold would have a large value, but, under the ruling of the court below, it can go into the rate base at only the original nominal cost thereof. All the company could possibly realize, under the judgment of the court below, from its ownership of said leasehold and its use in the public service, is a return of 6½ per cent. on $100, amounting to $6.50 a year. The company and its stockholders are, therefore, no better off for getting several ten million cubic foot wells on the tract than they would be for getting one well producing, say, one hundred thousand cubic feet per day. *Thus, all the benefit resulting from the discovery of gas on the leasehold and its production therefrom goes to the consumers.* This conclusion is inevitable.

The "book value" method clearly ignores the present value of the leasholds and is directly in conflict with numerous decisions of this Court holding that rates prescribed by

state authority for a public utility, in order to escape confiscation, must yield a reasonable return upon the present fair value of the property used and useful in the public service.

It cannot be due process of law for the state of Ohio to prohibit a natural gas utility from entering in its fixed capital accounts anything more than the bare cost of its leaseholds, call that cost "book value," and limit the company to a return thereon. The judgment under review is a clear violation of the 14th Amendment.

The statement of the appellee in its opinion (R. 153), that it

> "* * * is of the view that when this non-productive acreage is brought into production that the cost incurred in carrying it through its nonproductive period may then well go into its valuation, and be capitalized"

means nothing. There is no assurance that the commission which might be sitting at the time would live up to this promise in any future case, and no assurance that the Supreme Court of Ohio would not reverse it on appeal by consumers, if it did. If that theory is correct, an undivided half interest in a leasehold which has been carried for twenty years would be valued at twenty times as much as the other undivided half interest in the same premises, acquired under a lease with like terms and conditions only a year before a good well was drilled. If the Supreme Court of Ohio should refuse to capitalize such carrying charges and treat them as the present value of the properties, the company would have no standing in this court to reverse the state court on the ground that its property was

being confiscated. The amount of carrying charges paid on a gas leasehold in the past has no more to do with its present value than the amount of rent paid for nine years under a ten years' lease of a business block has to do with the present value of such lease for the remaining year of its term.

United Fuel cases distinguished

The appellee and court below appear to treat the decision of this Court in *United Fuel Gas Company* v. *Railroad Commission of Kentucky*, 278 U. S. 300, as controlling this case. In so doing, they disregard the *substance* of the decisions.

In the *United Fuel* case, the company had 68,900 acres of operated leases and 746,010 acres of unoperated leases (13 F. (2d) 512); the district court allowed a value of $6,732,920 for the leaseholds, being the book value thereof (13 F. (2d) 520); and that was affirmed by this Court (278 U. S. 300, 318). If, to make it correspond with this case, the entire valuation of leaseholds be allocated to Class No. 1, the amount allowed is equivalent to $97.00 per acre for the operated leases. In the present case the book value of No. 1 leases, which the court below holds is all that can be included in the rate base, is $1,569,479 (R. 3164-5), which is equivalent to $5.38 per acre for the 291,396 acres of class No. 1 in this case.

At $97.00 per acre, the No. 1 leases of the Ohio company would amount to $28,265,412, which is more than the total value proved for all the leases of all four classes, if the lowest valuation for each class be taken—that is, $11,473,717 for No. 1, plus $9,884,340 for No. 2, plus $1,250,524 for No. 3, plus $4,130,842 for No. 4, total $26,739,423. *In addi-*

tion to that, in the United Fuel case, all of the carrying charges of the unoperated leases are included in the operating expenses. In this case nothing is included in the operating expenses for the carrying charges of the unoperated leases.

In the *United Fuel* case this Court, speaking through Mr. Justice Stone, said:

> "It was stated on the argument that these leases, not only singly but in blocks, are sold in open market, but their market price appears not to have been established.
>
> Appellants do not accept either cost or market value as the basis of value of their gas rights." (278 U. S. 314)

In the present case the company did accept and assert the market value of its gas leaseholds, and did prove their market value.

In the *United Fuel* cases, the testimony as to the value of leaseholds primarily relied on was that of geologists, determined by elaborate calculations of the present worth of the estimated profits to be realized from the production and sale of the estimated amount of gas reserves in the leaseholds, operated and unoperated, at assumed varying prices for gas, over a period of eighteen years, etc., etc., *the calculated present worth of such estimated profits being taken as the measure of the present value of the premises.* The remaining testimony pertinent to the valuation of the leaseholds appears to have followed the same lines. This Court said:

> "Examination of their testimony discloses that these estimates were not based on prevailing prices

> for gas leases or on actual sales, but, as in the case of the geological and engineering experts, upon an estimated or assumed exhaustible supply of gas available to appellants until exhausted, and upon a predictable price for natural gas in unregulated markets through a future period of about eighteen years. Common characteristics of both methods of valuation, therefore, are the estimation on uncertain bases of the volume of gas available and of the price at which it may be sold through a long future period." (278 U. S. 316)

In the present case the values of the gas leaseholds testified to by the witnesses (Appendix A, p. 139) comes within the rule laid down by this Court in the *United Fuel* case. They were *not* made up of such estimates of profits but were the opinions of the witnesses as to the general market value of the leaseholds, in the open market, in dealings between willing buyers and willing sellers, these opinions being based upon actual sales and selling prices of such properties and upon the knowledge of the witnesses as to the demand for such properties in the open market and the prices which prospective purchasers were willing to pay therefor.

The decisions in the *United Fuel* cases are treated by the appellee and the court below as if this Court had held that the book value of natural gas leaseholds, in a rate case, should be accepted in lieu of the present value thereof. That this Court did not so hold is clear from the following language from its opinion:

> "On the record as made, appellants have failed to present any convincing evidence of value of their gas field which would enable us to assign to it any

> greater value than that which they appear to have assigned to it on their books. *This book value, therefore, may be accepted, not as evidence of the real value of the gas field, but as an assumed value named by the appellants,* which, on the evidence presented, cannot reasonably be fixed at any higher figure." (278 U. S. 318)

This language shows no deviation from the settled rule that it is the present value of a utility's property used and useful in the public service, and not the cost or book value thereof, on which it is entitled to earn a reasonable return. The book value was adopted in the *United Fuel* cases only because the record failed to show proper evidence of the present value of the leaseholds. In this case the prices actually paid for natural gas leaseholds, in the State of Ohio, were shown.

(9) Leasehold Valuation Took Into Consideration Payment of Carrying Charges.

The appellee argues that, because the delay rentals and well rentals accruing under the leases are paid and charged as operating expenses, the consumers pay such carrying charges, and, consequently, it would be unjust to require them to pay a return on the value of this property; and, apparently, the court below adopted this view. Time and again throughout the examination of the witnesses on the value of the Ohio company's leaseholds, the appellee presented this theory in questioning the witnesses. This theory is wrong, for two reasons, one of law and one of fact.

1. **As to the legal reason.**—In *Board of Public Utility Commissioners* v. *New York Telephone Company,* 271

U. S. 23, 32, Mr. Justice Butler, in delivering the opinion of this Court, said:

> "Customers pay for service, not for the property used to render it. Their payments are not contributions to depreciation or other operating expenses, or to capital of the company. By paying bills for service they do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company. Property paid for out of moneys received for service belongs to the company, just as does that purchased out of proceeds of its bonds and stocks."

2. **As to the question of fact.**—The value proved is the value of the leasehold estates, as created by the various instruments of title; these estates are subject to the payment of all delay rentals, well rentals, etc., provided for in the various leases. *A determination of the value of the leasehold estate necessarily takes into consideration delay rentals, well rentals or other burdens to which it is subject.* If there were no such carrying charges—if the company owned the land in fee—the value of the property would be much greater, and the amount on which the company would be entitled to earn, and consumers required to pay, would be correspondingly higher. The holder of the land under a lease has the right to take out and use the gas as fully as the owner in fee, and in fact does so. All the gas-producing capability of the land is in use furnishing gas to consumers, as fully under a lease as under fee ownership.

(10) The court below erred in holding that the laws of Ohio make no provision for amortization of the property of a natural gas utility, and in not holding that the state statutes, as so construed, are void under the 14th Amendment to the Constitution of the United States.

The court below held in the Columbus case that,

> "The laws of Ohio make no provision for amortization * * *." (R. 59 and 74)

This ruling is revolutionary. The holding that a utility is not entitled to be compensated for the consumption of its capital assets in the public service is so extraordinary it is hard to discuss it. No good purpose would be served by citing and commenting upon the numerous decisions of this court which have established the rule that when property is taken for public use the owner is entitled to just compensation for the property taken, that just compensation means the equivalent in money of the property, and that, if the property has a market value, that is the final test of just compensation. *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312; *Seaboard Air Line Ry. Co.* v. *United States,* 261 U. S. 299; *United States* v. *New River Collieries Company,* 262 U. S. 341; and *L. Vogelstein & Co.* v. *United States,* 262 U. S. 337, are a few of such cases.

The decisions of this Court are about as numerous, and just as clear, that public utilities are private property, that they are entitled to the protection of above mentioned provision regarding just compensation for property taken for public use, and that the compensation to which a utility is entitled for the use of its property in the public service is a reasonable return upon its present fair value. Among

such cases are, *Chicago, Milwaukee & St. Paul Railway Co.* v. *Minnesota*, 134 U. S. 418; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, at 410, and *United Railways* v. *West*, 280 U. S. 234. It would answer no useful purpose to cite and discuss the long line of cases from *Smyth* v. *Ames*, to the present time.

Indisputable Facts Regarding Necessity for the Amortization of Certain Properties of a Natural Gas Company.

There is no pretense that Class No. 1 leaseholds and the properties in gas well construction and gas well equipment accounts have a perpetual life, or that they do not become exhausted, or totally worn out, in the public service, in a relatively short time.

The appellee found that the remaining life of these three classes of property was three years and two months, but the court disapproved that holding (R. 80). The testimony of Mr. Seyffert at R. 1052-53 shows that the No. 1 leaseholds contain only sufficient gas reserves to last the Ohio company ten years, if it could all be gotten out in that time, but that the attempt to do that would make the cost prohibitive. However, disregarding for present purposes the cost, it is clear that its present No. 1 leaseholds will not supply the demands of the Ohio company for more than ten years. This would mean an annual amortization charge of 10 per cent. of the present value of the leaseholds and the wells and equipment thereon. The company would be entitled to this allowance for amortization as a minimum; so far as the wells and equipment are concerned, it is clearly inadequate.

Appellee's valuation of No. 1 leaseholds should have been at least $11,473,717, its valuation of gas well con-

struction should have been at least $11,353,662, and of gas well equipment at least $7,772,140. The following is a statement of what the annual depletion of No. 1 leaseholds and amortization of gas well construction and gas well equipment would amount to on a ten-year basis:

No. 1 leaseholds (*supra*, 79)	$11,473,717
Gas well construction (*supra*, 62)	11,353,662
Gas well equipment (*supra*, 62)	7,772,140
Total	$30,599,519
10 per cent thereof	$ 3,059,951

The forgegoing does not include anything for the amortization of the plant as a whole, the present value of which, exclusive of the three items above, the appellee and court below found to be $57,239,254.

Amortization

In its opinion the Court below said:

"* * * If amortization was allowable under the laws of Ohio it should be spread over 25 years." (R. 76) Using the 4% per annum which results from the above mentioned life of 25 years, the annual amortization of the Ohio company's plant, exclusive of leaseholds, gas well construction and gas well equipment (4% of $57,239,254) amounts to $2,229,570.00 per year. Consequently the total amount of amortization charges ($3,059,951.00 plus $2,229,570.) is $5,359,521.

The appellee allowed for amortization $4,158,954.00. The difference between the appellee's allowance and what it should have allowed ($5,359,521.00 less $4,158,954) is $1,200,567.00. As the Ohio company's annual sales of gas amounted to 53,579,575 M.c.f. this deficiency in amortiza-

tion allowance is equivalent to 2.2¢ per thousand cubic feet.

The amortization allowance is designed to return to the stockholders their investment in the property by the time of the termination of the enterprise. As was said by the United States District Court for the Eastern District of Kentucky in *United Fuel Gas Co.* v. *Railroad Commission*, 13 F. (2d), 510, 518 (affirmed in 278 U. S. 300):

> "Because of the exhaustible character of his product, the natural gas operator is entitled to receive, through the returns charged, not only his actual expenditures of operation and depreciation charges in the sense of such sum as will keep his plant at 100 per cent operating efficiency, but he is also entitled to such rates as will refund to him his entire capital investment within the life of the business. When the field is finally exhausted, as it must be, the reserve for depletion, or amortization reserve, should be sufficient to repay to the investor 100 per cent of the original investment. * * * The right to this amortization or depletion reserve, or the right of the company to earn such sum as would reimburse the investor for his original capital investment at the termination of the business is universally recognized. This is in addition to what is ordinarily denominated a charge for depreciation or deterioration by use."

In re Baker Natural Gas Utility, P. U. R. 1921E, 609, 626, the Public Service Commission of Montana said:

> "Depreciation and depletion in a utility of this nature are an amortization charge. Were this not so the stockholders would lose their investment and be obliged to content themselves with the interest they had received thereon. Unlike other utilities operating in theory at least, in perpetuity, with the recurring levy for renewals and replacements preserving the

> investment intact as a going concern, the natural gas utility suddenly ceases on the exhaustion of its natural stores, and its appliances are rendered useless for their original uses. Unless there has been accumulated a money reserve in a depreciation and depletion fund equal to the investment the stockholders must pocket their losses, and, under regulation, this means an end of natural gas development for public uses."

An analogy for the allowance of amortization in natural gas rate cases is found in the Federal Income Tax Act of 1916 (and later enactments) authorizing deductions for the exhaustion of mining property (coal, copper, gas, iron ore, oil, etc.), in arriving at taxable income.

In *United States* v. *Ludey*, 274 U. S. 295, 300, 302, this Court said:

> "We are of the opinion that the revenue acts should be construed as requiring deductions for both depreciation and depletion when determining the original cost of oil properties sold. . . .
>
> The depletion charge permitted as a deduction from the gross income in determining the taxable income of mines for any year represents the reduction in the mineral contents of the reserves from which the product is taken. The reserves are recognized as wasting assets. The depletion effected by operation is likened to the using up of raw material in making the product of a manufacturing establishment. As the cost of the raw material must be deducted from the gross income before the net income can be determined, so the estimated cost of the part of the reserve used up is allowed. The fact that the reserve is hidden from sight presents difficulties in making an estimate of the amount of the deposits. The actual quantity can rarely be measured. It must

> be approximated. And because the quantity originally in the reserve is not actually known, the percentage of the whole withdrawn in any year, and hence the appropriate depletion charge, is necessarily a rough estimate. But Congress concluded, in the light of experience, that it was better to act upon a rough estimate than to ignore *the fact of depletion.*"

In *Hammond* v. *Public Service Commission,* 96 Ore. 595, 189 Pac. 639, 9 A. L. R. 1223, the Supreme Court of Oregon held that a railroad used to remove the timber to be cut from a tract of land was entitled to charge rates which would provide for the amortization of its cost as well as yield a fair return on the value of the property. In the opinion the Court said:

> "• • • the company is entitled to such rates as will fairly compensate it for the service rendered, and for the depreciation of its plants employed in such service, even though it reaches the vanishing point. In other words, the company ought to be allowed to come out even, in an undertaking which may reasonably be expected to exhaust itself, and, besides quitting whole, to receive a fair compensation for its services. The carrier ought not to be compelled to sacrifice its plant, and be content merely with compensation amounting only to interest on its value. To ignore this principle would be to violate the constitutional inhibition already quoted. A public service corporation cannot be expected to sacrifice its property for the public good."

In the recent case of *Central Kentucky Natural Gas Co.* v. *Railroad Commission,* 60 F. (2d) 137, 141, the Statutory Court said:

> "The plan adopted by us provides for the return to the plaintiff of its entire capital by amortization in a period of twenty years. It permits the deduction of the necessary expenses incurred in ordinary maintenance. It furthermore sets up an annual reserve to cover extraordinary maintenance and repairs. It permits the deduction of all taxes, including the federal income tax."

In reviewing that case this Court said (290 U. S. ——, decided December 4, 1933):

> "Respondents assail the court's findings • • • of value and of the amount to be allowed as a deduction from gross revenue for amortization of the appellant's plants. So far as these objections and others are addressed to the weight of the evidence, we are satisfied that the evidence supports the findings as restricted in the manner already indicated."

See, also, *Fort Worth Gas Company* v. *City of Fort Worth*, 35 F. (2d) 743; *Clarksburg Light & Heat Co.* v. *Public Service Commission*, 84 W. Va. 638, 100 S. E. 551; *Re American Indian Oil & Gas Co.*, P. U. R. 1928C, 815, 828; *City of Wheeling* v. *Natural Gas Co. of West Virginia*, P. U. R. 1933D, 1.

The *Yale Law Journal for January, 1934* (volume XLIII) at page 483, contains a "*Note*" on the "*Propriety of Including Amortization Allowance in Expenses of Natural Gas Utility Company,*" which deals with the decision of the court below in the Columbus case. The law is there well stated as follows:

> "The company is entitled to earn, in addition to a fair return and a fair allowance for depreciation

and current maintenance, an amount sufficient within the probable life of the business to repay the investor the entire capital investment less salvage at the end of its present use.

In a recent case the Supreme Court of Ohio revealed an unfortunate lack of comprehension of these problems."

In *11 Fletcher's Cyclopedia Corporations, permanent edition, section 5347, page 865,* it is said:

> "The term 'wasting asset' is in common use among accountants and others, as applied to mines and oil wells, for example, and characterizes such property with some effectiveness. The phrase imports that the asset which is consumed in specie in the course of ordinary exploitation deserves a class by itself. By parity of reasoning, the implications of the wasting asset characteristic have been extended to assets which are consumed by lapse of time, such as leaseholds and patents. The consumption of ordinary assets through wear and tear, rust and decay is universally known as depreciation. The gradual exhaustion of a mine or an oil well becomes, *per contra,* depletion."

It will be observed that the court below does not hold that, as a fact, an amortization charge is not necessary to make good to a utility the consumption of its property in the public service, but merely holds that the statutes of Ohio do not authorize such an allowance, and, *because no such statutory provision exists, no allowance can be made for amortization under the laws of Ohio.* This is the first time that the laws of Ohio relating to the regulation of public utilities have been so construed.

It is inconceivable that the state, which cannot take the *use* of a utility's property without paying reasonable compensation therefor, may take and consume the property itself and pay nothing for it.

(11) The judgment of the court below by failing to include in the company's operating expenses allowance for delay rentals or carrying charges paid on reserve leaseholds takes its property without due process of law, contrary to the 14th Amendment.

In this case appellee allowed the Ohio company a valuation on gas leaseholds sufficient to last, according to its express finding, only three years and two months, and allowed nothing for delay rentals on unoperated leaseholds. It gives no reason therefor except to say in substance it feels bound by the decision of the Supreme Court of Ohio in the Logan case to value only operated leaseholds, and that it logically follows the carrying charges on unoperated leaseholds cannot be included in operating expenses. The judgment below affirmed that finding and determination.

The uncontradicted evidence shows that it is the universal practice in the natural gas industry for producing companies to carry a large amount of reserve leaseholds to insure a future supply of gas and the continuity of its business, and to charge the delay rentals or carrying charges of such reserve leaseholds to operating expenses.

Counsel believe this is the first case in any jurisdiction in which carrying charges or lease rentals of reserve leaseholds have not been allowed. For instance, in *United Fuel Gas Company* v. *Railroad Commission of Kentucky*, *supra*, the utility was allowed to include in its operating expenses the delay rentals on 746,010 acres of unoperated leaseholds. The same situation existed in the companion case of *United*

Fuel Gas Company v. *Public Service Commission of West Virginia, supra.*

In the recent case of *Wichita Gas Co.* v. *Public Service Commission,* 2 F. Supp. 792, 810, the Statutory Court included the delay rentals on the company's entire unoperated leaseholds, consisting of 1,220,064 acres, in the operating expenses. This decision was modified on another ground and affirmed in 290 U. S. ——.

The holding that only the operated, or Class No. 1, leaseholds are used and useful is directly contrary to all the evidence in this case. The error in the holding as to the amount of leaseholds used and useful in the public service is, on the appellee's own statement, directly responsible for the holding on this point.

The appellee realized that the Ohio company owns leaseholds of Classes 2, 3 and 4 and clearly contemplates that it shall keep them and gradually bring them into use. It thus allows consumers the benefit of the company's ownership of those leaseholds, in lessened operating charges, but allows the company no benefit whatever from ownership, not even the carrying charges thereon. In other words, there is no way in which the company can possibly profit by taking these leaseholds and developing them. Of course, the appellee knows the company cannot, as a practical business proposition, dispose of its leaseholds of Classes 2, 3 and 4 and thus sacrifice $67,000,000 worth of other property.

It cannot be fair and reasonable for the state of Ohio, after the company, having used its best judgment to provide an adequate supply of gas and invested the amount of money necessary to transport and distribute such supply, now practically to destroy the investment by refusing it the right to continue in business in the same way the nat-

ural gas business has always been conducted in Ohio and in other states.

In his dissenting opinion in the Columbus case, Judge Jones said:

> "The disallowance for delayed rentals and of valuation for the gas reserve leases, which are designate as 'Class No. 2,' is, in my judgment, erroneous. 'Class No. 2' is used and useful as a reasonable reserve gas property, and should have been given a reasonable valuation." (127 O. S. 136; R. 81)

(12) The judgment of the court below in disregarding the contract between the Ohio company and the United company under which the former purchases from the latter gas produced in West Virginia and Kentucky and transported in interstate commerce, and in fixing as the price which the Ohio company could include in its operating expenses for said gas an amount less than that fixed by said contract and paid is an interference with, and a burden upon, interstate commerce, in violation of Article I, Section 8, Clause 3, of the Constitution of the United States.

In *Missouri* v. *Kansas Natural Gas Company*, 265 U. S. 298, this Court held that:

> "The business of piping natural gas from one State to another and selling it, not to consumers, but to independent distributing companies which sell it locally to the consumers, is interstate commerce, free from state interference." (Syllabus)

In the recent case of *State Corporation Commission* v. *Wichita Gas Company*, 290 U. S. ——, decided January 8, 1934, this Court said:

> "The Kansas statutes empower its public service commission to regulate the service and to fix rates

to be charged by public utilities including the distributing companies. They prescribe heavy penalties for failure to comply with commission-made orders. But the sale, transportation and delivery of natural gas by the pipe line company to the distributing companies constitutes interstate commerce and therefore the State is without power to prescribe rates or prices to be charged therefor."

III

Rate of Return

In its order in this case appellee merely says: "Return on Investment 6½%" R. 223; the lower court affirmed without mentioning this subject matter. In the Columbus case the appellee discusses rate of return at R. 166, P. U. R. 1933A, 360-361, but the court below made no reference to it in its opinion (R. 82, 127 O. S. 109).

The evidence on rate of return shows that appellant is entitled to not less than 8 per cent. Both appellee and the court below, without assigning any reasons therefor, wholly disregarded the evidence and arbitrarily used 6½ per cent. for return in their calculations on the reasonableness of the rates in question.

Mr. Hamilton testified that natural gas utilities require a higher rate of return than most others, and that 8 per cent. would be the minimum return to attract capital to the natural gas business (R. 566).

From its opinion in the Columbus case, it would appear that appellee substantially agrees with Mr. Hamilton regarding the hazardous character of the natural gas business and the rate of return which a company engaged

therein should have, but because of the business depression existing at the time its order was entered in this case (which was not in effect on the date certain) it used a lower figure. Appellee said:

> "In prosperous times 7 and 8 per cent. and even more were allowed. A gas company is a more hazardous undertaking than is a water company or power company because its whole existence depends upon the continuance of the gas supply and, therefore, it might be justly said that such a company would be entitled to a greater rate because of the greater risk involved."

The question before appellee was the reasonableness of appellant's rates at the effective date of the schedules under consideration (July 17, 1929), which has generally been regarded as the very peak of prosperous times in this country. However, the reference to "the present depression" in its opinion handed down in the Columbus case on October 3, 1932, leaves no doubt that appellee fixed the rate of return in this case (order entered November 3, 1932), because of the business depression existing at that time.

It needs no argument to show that rates could not be made unlawful as of July 7, 1929, because of hard times existing in November, 1932. Appellee's own statement of the reason for adopting a rate of return of 6½% is ample proof that its order in this particular is unreasonable, confiscatory and unlawful and should be reversed. This applies equally to the rates of return to be allowed to the Ohio Fuel Gas Company and the United Fuel Gas Company in the determination of the reasonableness of the contract price of gas sold appellant.

In *Wichita Gas Co.* v. *Public Service Commission*, 2 F. Supp. 792, 811, the Statutory Court observed:

> "The witness for the Commission testified that 8 per cent. would not be an unreasonable return in normal times, but testified that these times are abnormal, as they are. But if abnormality is considered, the return must be increased, not decreased. In these times, when stock of the best utilities can be purchased on a 9 per cent. basis or better, certainly an 8 per cent. return on this hazardous enterprise is not unreasonable."

In *Smith* v. *Birmingham Gas Co.*, P. U. R. 1932B, 241, 245-247, the Alabama Commission said:

> "The question raised in this proceeding—*i. e.*, 'Why utility rates should not decline in company with falling commodity prices?' is one that has been asked by many consumers of utility service in recent months. It is a very natural inquiry under present conditions, and it is pertinent to the issues in this case to point out some of the fundamental differences between public utility business and private enterprises.
>
> * * * unregulated industrial and commercial enterprises are free to charge for their products all that can be obtained during prosperous times. The limit to their price or profit is determined by supply and demand.
>
> In the case of regulated utilities, the regulation of rates and control of return is exercised to the end that rates, at all times, be maintained at a reasonable level. Were the utilities unregulated, as is true of private enterprises, if they were free during prosperous times to fix rates without regulatory control, then they could with justice, perhaps, be subjected

to the price fluctuations suffered by private business during economic depressions. If, however, they have not been permitted to earn more than a fair return during prosperous times, this fact must be given due consideration when we deal with their rates and their rate of return during periods of general business depression.

It must be apparent, therefore, to every thinking man, that public utilities cannot be subjected to the sharp price fluctuations which are incident to private business. * * *

Another thing which people generally overlook is that during this depression the utilities generally have lost much business, like private industries, and consequently, their revenues have fallen off similarly to private business. While operating expenses of the utilities have been somewhat reduced under changed economic conditions, they are required to keep always sufficient force to maintain adequate service.

In connection with this subject, it must be remembered that the ordinary commercial enterprise turns its capital over several times each year. The utilities turn their capital over once in four to ten years. Thus fixed charges, taxes, depreciation, and interest, being determined by the amount of the capital or investment requires to conduct the business, are very high for utilities, as compared with the usual commercial and industrial establishments. These fixed charges make up from fifty to seventy per cent. of the cost of furnishing utility service. They cannot be reduced during periods of smaller output and sales of utility service. In fact, taxes continue to increase every year.

The remaining costs of utility service, comprising thirty to fifty per cent. of the total, do not for reasons we have pointed out and for other reasons apparent, afford the opportunity for the same pro-

portion of reduction of total operating cost resulting from decrease in commodity prices as applies in cases of most private enterprises.

Due to the very large proportion of cost represented by fixed charges and due to the nature of the other operating expenses, the utilities' total operating expenses have been affected to a lesser degree by declining prices of materials and labor than most other industrial enterprises.

There is another important difference between utilities and private business. In hard times like the present, the private business ceases to borrow money, immediately curtails expenses by cutting down production or by refusing to buy, unless the price is satisfactory, and, if necessary, closes up shop and awaits more prosperous times. The public utility because of its obligation to continue to serve and to render adequate service, is greatly limited as to the extent to which it can go in making any such economies."

The considerations or factors entering into the determination of what is a fair rate of return were never better stated than by this Court in *Bluefield Water Works & Improvement Co.* v. *Public Service Commission*, 262 U. S. 679, 692, where it was said:

"What annual rate will constitute just compensation depends upon many circumstances and must be determined by the exercise of a fair and enlightened judgment, having regard to all relevant facts. A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are

attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility, and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties."

As stated by this Court in *United Railways* v. *West*, 280 U. S. 234, 249, 251-252, no rule can be laid down "which will apply uniformly to all sorts of utilities. What may be a fair return for one may be inadequate for another, depending upon circumstances, locality and risk. • • • It is manifest that just compensation for a utility, requiring for efficient public service skillful and prudent management as well as use of the plant, and whose rates are subject to public regulation, is more than current interest on mere investment. Sound business management requires that after paying all expenses of operation, setting aside the necessary sums for depreciation, payment of interest and reasonable dividends, there should still remain something to be passed to the surplus account; and a rate of return which does not admit of that being done is not sufficient to assure confidence in the financial soundness of the utility to maintain its credit and enable it to raise money necessary for the proper discharge of its public duties."

The well known fact that the natural gas industry operates under more hazardous conditions for investors than most public utilities has frequently been commented upon by commissions in courts. In *Pennsylvania Gas Co.* v. *Pub-*

lic Service Commission, 207 N. Y. S. 599, 611, the Supreme Court of New York said:

> "The hazards of the natural gas business are also relevant factors in determining what will constitute a fair return."

In *Oklahoma Natural Gas Company* v. *Corporation Commission*, 90 Okla. 84, ..., 216 Pac. 917, 923, the Supreme Court of Oklahoma observed:

> "In determining what would be a fair return and a reasonable allowance for depreciation and amortization, it is proper to take into consideration the character of the business of the public utility, and in this connection it should be borne in mind that a natural gas public service business is generally more hazardous than the business of any other public utility. The duration of the business is limited by nature, because the commodity in which the utility deals is supplied by nature alone. The supply is limited and is exhaustible, and when exhausted can never be recreated. All that man can do is to find and furnish the supply that nature has created, and when this supply is exhausted the business of the utility is at an end. This is not true of any other public service business."

In *Re Ashtabula Gas Company*, P. U. R. 1917D, 790, 795-796, the Ohio Commission, in allowing a ten per cent. return to the company, said:

> "The natural gas business differs materially from that of any other which is classed as a public utility. Its production is in the nature of a mining venture. It can be produced only in limited areas, and when once discovered, it is only by continuous

mining that the extent of the field can be ascertained and the supply maintained.

Electricity may be produced anywhere that the machinery can be installed. Water may be found either on or below the surface, everywhere save in the desert. Telephonic communication and railway transportation may be indefinitely carried on anywhere, and all of these services may be perpetually furnished, but natural gas is limited to comparatively few localities, and the life of the enterprise depends upon the uncertain supply of nature. Experience has taught that at best a field cannot last longer than two or three decades. Those who engage in the venture must get their money back within a few years or not at all, and those who enjoy the luxury must pay a sufficient sum to enable the producer to do so, or capital will not be attracted to such ventures.

Because of the hazard and uncertainty of the business, commissions and courts have recognized the justness of granting to a gas company a higher rate of return on its investment than is given to other utilities which furnish a commodity whose cost of production can be ascertained with reasonable certainty and whose business can be perpetual."

In *Re Baker Natural Gas Utility*, P. U. R. 1921 E, 609, 627, the Montana Commission fixed the fair rate of return at 11 per cent., and said:

"The decided cases justify a higher rate of return for natural gas utilities than for any other utilities because of the relatively short period for capital investment therein, and the unusual hazards attending operation and this notwithstanding these factors are given weight in the allowances for depreciation and depletion which allowances must be borne by the

> rates charged for the service. We know of no sound reason for denying the application of these decisions to this case to the extent of three or four per cent. beyond the rate of return found fair for other investments, having regard to all the elements comprehended in a 'fair' return and reasonable rates."

The natural gas business is dependent upon the hazards of mining, the commodity distributed is not self-generative, and is limited in supply. As observed by the Supreme Court of Ohio in the case of *Floyd* v. *Light & Heat Company*, 111 O. S. 57, 73: "One important difference between natural gas utilities and those utilities where the product is manufactured rather than produced by nature is that the hazards of the natural gas utilities are greater • • •."

If the attractions in the way of profit and safety of investment in natural gas enterprises are not reasonably comparable with those offered by other industries capital will naturally seek such other employment. And, as observed by David Lawrence in an editorial in the issue of the United States News for January 19, 1934, "when government kills the opportunity to earn, it sounds the death knell of the opportunity to serve."

Under these circumstances appellant is certainly entitled to a higher rate of return than the average utility. In *Denver Union Stock Yards Co.* v. *U. S.*, 57 F. (2d) 735, the Statutory Court held that 7½ per cent. was the minimum allowance for a company engaged in a much less hazardous business. It is obvious that the rate of return for a natural gas company should be higher than that of telephone, water, electric, etc., companies.

The following is a partial list of cases in which the return allowed natural gas companies was 8% or over:

	Per cent.
1. Wichita Gas Co. *v.* Public Service Commission, 2 F. (2d) 792 (Kansas)	8
2. *Re* American Indian Oil & Gas Co., P. U. R. 1928C, 815, 828 (Oklahoma)	8
3. Western Oklahoma Gas & Fuel Co. *v.* State, 113 Okla., 126	16
4. *Re* Pittsburgh & West Virginia Gas Co., P. U. R. 1927D, 844, 849 (West Virginia)	8
5. *Re* Valley Natural Gas Co., P. U. R. 1923C, 112 (California)	10
6. *Re* Baker Natural Gas Utility, P. U. R. 1921E, 609, 627 (Montana)	11
7. Board of Trustees *v.* Empire Gas & Fuel Co., P. U. R. 1919C, 115 (New York)	9.6
8. *Re* Ashtabula Gas Co., P. U. R. 1917D, 790 (Ohio)	10

The statutory obligation imposed upon appellee was to fix "just and reasonable rates" (Sec. 614-44, G. C.). The issue before the lower court was not merely the question of confiscation but the reasonableness of appellant's schedule of rates.

In *City of Portsmouth* v. *The Public Utilities Commission*, 108 Ohio St. 272, 278; 140 N. E. 604, 606, the court said:

> "Unjust and unreasonable rates and confiscatory rates are by no means synonymous. A rate which would not be confiscatory in character, by reason of the amount being somewhat above the point of con-

> fiscation, yet might not be a reasonable and just rate as between the public and the owner under all the circumstances of the case."

And after quoting from decisions to like effect in other jurisdictions (see, *Public Service Gas Co.* v. *Board of Public Utility Commissioners*, 84 N. J. Law, 463, 471, 87 Atl. 651, 655) said (108 O. S. 275):

> "We think there must be a clear line of demarcation between a rate that is confiscatory in character and one that must be fair and reasonable. It is not sufficient to say that because a rate is not confiscatory in character it must necessarily follow that it is fair and reasonable and just to both parties."

In *State Public Utilities Commission* v. *Springfield Gas & Electric Company*, 291 Ill. 209, 217; 125 N. E. 891, 895, the Supreme Court of Illinois pointed out:

> "* * * there is a difference between a rate which is merely non-confiscatory and one which is just and reasonable, and it is the just and reasonable rate which the commission is called upon to fix."

In *Banton* v. *Belt Line Ry.*, 268 U. S. 413, 423, this Court said:

> "The mere fact that a rate is non-confiscatory does not indicate that it must be deemed to be just and reasonable. It is well known that rates substantially higher than the line between validity and unconstitutionality properly may be deemed to be just and reasonable, and not excessive or extortionate."

In *Columbus Gas and Fuel Company* v. *City of Columbus*, 17 F. (2d) 630, 641, the court stated the principle thus:

> "There is a well-marked distinction between a return non-confiscatory in character, and one which is fair in a commercial and economical sense. A rate of return may be all sufficient in fulfilling the demands of the Fourteenth Amendment to the Constitution of the United States, and at the same time fail in amount to encourage and justify the operation of a utility business under that degree of maximum efficient service to which the public is entitled."

In the recent case of *Wichita Gas Co.* v. *Public Service Commission*, 2 F. Supp. 792, 799, the Statutory Court said:

> "A 'reasonable rate' is one that falls within the zone of reason; it is a field, and not a mathematical point. The lower limit of the zone of reason is confiscation, that is denial of a net return sufficient to preserve property and attract capital necessary to enable the utility to discharge its public duties. A finding that a particular rate is reasonable is not, therefore, a finding that every other rate is either unreasonable or confiscatory."

While a "just and reasonable rate" is not to be measured by the bare test of confiscation, there can be no doubt about the confiscatory character of the rates directed to be put into effect by appellee's order in this case. The ruling on this matter by appellee and the court below, being unsupported by and contrary to the evidence, should be set aside.

IV

Order of Refund

The judgment of the court below, in affirming the order of the appellee requiring appellant to refund to its consumers the difference between the rates collected for gas service under the present schedules and the rates which would have obtained under the prior schedules, takes the property of appellant without due process of law, in violation of the 14th Amendment.

The order under review not only takes the use of appellant's property without just compensation, but requires appellant to refund to consumers all moneys received by it since the effective date of the present rates in excess of the previously existing rates (R. 225-227). This difference in rates amounts to over $300,000. Thus the order and judgment under review take the property of appellant without due process of law, in violation of the 14th Amendment.

SUMMARY STATEMENT SHOWING RESULT OF CORRECTION OF ONLY A FEW OF THE ERRORS COMPLAINED OF

Appellant's Property

Appellant's valuation	$ 1,250,221.00
8% return thereon	100,017.00
Return allowed by appellee (6½% of $868,387.00)	56,445.00
Deficit in return allowed	43,672.00
Annual depreciation, deficit in amount allowed ($43,981.00 less $13,721.00)	30,261.00
Total of above deficits	74,933.00
This deficit is equivalent ($74,933.00 divided by 1,192,471 M. c. f., sales by appellant) to 6.2¢ per M. c. f.	

Ohio Company's Property

Value fixed by appellee	74,538,280.00
To this should be added the necessary corrections for errors in the valuation of the following items:	
No. 1 Leaseholds	4,188,817.00
No. 2 Leaseholds	9,884,340.00
Gas Well Construction	5,508,970.00
Gas Well Equipment	3,702,706.00
Valuation (including corrections on above items)	$97,823,113.00
8% return thereon	$ 7,825,849.00
Appellee allowed return of	4,844,566.00
Deficit in return allowed on above	$ 2,981,283.00
This is equivalent ($2,981,283.00 divided by 53,579,575 M.) to 5.5¢ per M. c. f.	

Adding to this 2.2¢, *supra*, 112, resulting from the errors in amortization gives 7.7¢ per M. c. f. on all gas sold by Ohio company:

The net result of the correction of the above-mentioned errors in the valuation of appellant's property, its annual allowance for depreciation, and rate of return, amounts to 6.2¢ per thousand cubic feet for all gas sold by appellant in the towns which is more than the difference between the contract price it pays for gas (45¢), and the amount which appellee determined to be the fair and reasonable price (39¢) therefor. The sum of these figures (6.2¢ and 7.7¢) equals 13.9¢ per M. c. f.

It thus appears that the correction of these particular errors pertinent to the property and business of the appellant alone, or those pertinent to the property and business of the Ohio company alone, is more than sufficient to make up the difference between the contract price of gas and the sum which the appellee determined to be the reasonable charge therefor. The correction of these obvious errors will more than justify appellant's present schedule of rates.

These figures take no note of the results of the errors pertinent to the property and business of the United company. If similar calculations were made with reference to that company, they would add still further to the figures used by the appellee and court below as the reasonable price payable by appellant to the Ohio company. The use of certain errors only for the purpose of these calculations is not to be construed as a waiver of other errors assigned.

V

Court Did Not Exercise Independent Judgment

1. The court below failed and refused to exercise its own independent judgment on questions of fact as well as law, and its judgment, therefore, results in a violation of the 14th Amendment.

This case is similar to *Ohio Utilities Co.* v. *Public Utilities Commission of Ohio*, 267 U. S. 359, in which this Court reversed the Supreme Court of Ohio for refusing to follow the testimony. The following language of Mr. Justice Sutherland, in delivering the opinion of the Court (p. 364), is pertinent here:

> "From the foregoing, it is evident that the state supreme court did not accord to the plaintiff in error that sort of judicial inquiry to which, under the decisions of this court, it was entitled."

The following authorities also establish appellant's right to the independent judgment of the court:

Ohio Valley Water Co. v. *Ben Avon Borough*, 253 U. S. 287;

Bluefield v. *Public Service Commission*, 262 U. S. 679;

Georgia Railway & Power Co. v. *Railroad Commission*, 262 U. S. 625.

2. The evidence in this case being uncontradicted and coming from witnesses whose competency and credibility were not questioned, is conclusive of the facts testified to.

In *National Shoe Co.* v. *Federal Trade Commission*, 280 U. S. 291, 299, this Court said:

> "And since there is no testimony to the contrary and no reason appears for doubting the accuracy of observation or credibility of the witnesses, their statements should be accepted."

and in *Crowell* v. *Benson*, 285 U. S. 22, 48:

> "An award not supported by evidence in the record is not in accordance with law."

See also:

Interstate Commerce Commission v. *L. & N. R. R. Co.*, 227 U. S. 88, 92;
Tagg Bros. & Moorhead v. *U. S.*, 280 U. S. 420.

The appellee and the court below acted arbitrarily in making deductions from the valuation of appellant's property and in reducing its allowance for operating expenses.

VI

The Court Erred in Overruling Application for Rehearing

Appellant filed with the court below an Application for Rehearing (R. 87) in which, in the 14th paragraph thereof, it set forth the court's holding that "the laws of Ohio make no provision for amortization," and averred, in part, that "the said decision of this court is a denial to the plaintiff in error of due process of law and the equal protection of the laws, and confiscates the property of the plaintiff in error, in violation of the Fourteenth Amendment to the federal Constitution; and the said statute of Ohio, as so interpreted by this court, violates the said Fourteenth Amendment.

The interpretation of the statutes of Ohio by this court, as hereinbefore set forth, had never been made prior to the decision by this court of the case of *Columbus Gas & Fuel Company* v. *Public Utilities Commission of Ohio*, hereinbefore mentioned, and this case, and consequently, this question could not have been presented in the original error proceeding in this case."

The Application for Rehearing was denied (R. 119) and final judgment entered September 20, 1933.

This Court has held that the raising of a federal question for the first time on petition for rehearing is sufficient.

Brinkerhoff-Faris Trust & Savings Co. v. *Hill*, 281 U. S. 673;

Missouri ex rel. Missouri Ins. Co. v. *Gehner*, 281 U. S. 313; and

Great Northern Railway Co. v. *Sunburst Oil & Refining Co.*, 287 U. S. 358.

Conclusion

The judgment of the court below should be reversed or modified by this Court in accordance with the record evidence and law applicable thereto.

Respectfully submitted,

JOHN E. MULLIN,
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CHESTER J. GERKIN,
Counsel for Appellant

Dayton, Ohio
February 24, 1934

APPENDIX A

Extracts From Testimony of Witnesses As to Market Value of Gas Leaseholds of the Ohio Fuel Gas Company

I. Showing that, at the Time and Place in Question, There Was a General Market for Leaseholds of the Amount and Character of Those Held by The Ohio Fuel Gas Company—not only No. 1 Leaseholds, but all Classes.

The testimony under this heading is submitted in refutation of the lower court's holding that

> *"No valuation can be based upon market price because of the fact that there is no market for a gas property so extensive as that of the Ohio Fuel Gas Company"* (R. 69).

Mr. Meals testified as follows:

"Q. Was there any market for natural gas leases in Ohio on or about the 30th day of June, 1929? * * *

The Witness: There was a market for acreage of that amount at that time" (R. 1251-1252).

* * * * * * *

"Q. I have gotten somewhat confused in our arguments back and forth, and I have forgotten whether I asked you whether or not in your opinion these gas leases could have been sold on or about the 30th day of June, 1930? * * *

The Witness: If this acreage had been for sale it could have been sold, in my judgment.

Q. Do you know of any willing buyers for the leaseholds of the Ohio Fuel Gas Company? I am just asking yes or no; not who they are. A. Well, I would have to answer that in this way that to my knowledge

they have not been offered for sale, but if they were, I know of willing buyers" (R. 1258).

Mr. Dally testified as follows:

"Q. (By Mr. Davies): Was there a willing seller of the leasehold acreage in question here on June 30, 1929? A. I can't say whether there was a willing seller. I believe there would have been a willing buyer" (R. 1108).

• • • • • •

"Q. (By Mr. Turner): They have been asking questions here that indicated that they didn't think there was any market for natural gas properties. Is there a market for natural gas property such as this? A. There is" (R. 1129).

Mr. Webber testified as follows:

"Q. (By Mr. Davies): Now, in making your values per acre, how did you convert that information into dollars? A. Why, I analyzed the properties in the way that I have stated, and then I viewed them from my standpoint as a whole, and what I could go to a willing buyer and offer them for and receive from him for them without any question of a doubt. I arrived at this valuation of $38,614,600.

"Q. You are talking now about the total acreage? A. Total acreage" (R. 1282-1283).

• • • • • •

"Q. What would govern a possible buyer in giving you that price for the acreage? A. He would have those analyzed by such men as have testified here today, unless he was able to analyze them himself. Their figures would be submitted and he would decide as to whether he wanted to buy them at that price or not, and I would feel perfectly confident a willing

buyer would accept those figures without any hesitation" (R. 1283).

• • • • • • •

"A. • • • I don't know how you are going to fix a price of gas in the ground, but we can fix it from an acreage standpoint because we know it is sold for that. We know acres have sold at a much higher price than I have put in this, in small lots; and investors in 1929 were looking for these big ones. I would have been delighted to have had that as a $38,000,000 proposition. They wanted to look at things of five million or better. I have inquiries now for territories of good size, getting them ready for later offers" (R. 1284).

Mr. Wittmer testified as follows:

"A. • • • If I would take these leases, or if the Ohio Fuel Gas Company would want to sell those leases, I don't think there is any question but that they could be sold for that price; and more for that reason than any other reason do I put those values on those leases" (R. 1182).

• • • • • • •

"Q. Do I understand you in answer to Mr. Davies to say that the prices given here on page 19 of this Exhibit 44 were what you believed that a willing purchaser would pay to a willing seller on or about the 30th day of June, 1929, for these gas land leases? A. They are" (R. 1188).

• • • • • • •

"Q. (By Mr. Turner): What is the fact as to whether or not a large tract of gas lands is worth more per acre than a smaller tract of gas land? Answer and amplify your answer to suit yourself and explain that to the commission. A. A large area of leaseholds

would be looked upon with very much more favor than a small tract, because it would carry with it possibilities in the way of supplying needed markets, continued development work that would be carried on" (R. 1194).

• • • • • •

"Q. Necessarily, Mr. Wittmer, where you have such a large acreage the number of possible buyers so-called is necessarily reduced, is it not? A. Yes, but it is all the more attractive" (R. 1197).

The above are only a few specimens of the testimony to the same general effect. Further pertinent extracts appear in this appendix.

II. Showing that the Values of the Leaseholds Testified to by the Several Witnesses Were not Calculations of Estimated Profits from the Production and Sale of an Estimated Quantity of Gas, at Assumed Prices, or Based upon Utility Rates, but Were the Market Values at which the Properties Would Sell in the Open Market, between Willing Buyers and Willing Sellers, outside the Public Service, or in a Market not Considering such Service.

This testimony is here set forth as refuting the assumption, or holding, by appellee and the court below that the values of leaseholds testified to by the several witnesses were in effect calculations of profits, such as were rejected by this court in the United Fuel Gas Company cases, or were based upon commission made rates.

Mr. Meals testified as follows:

"Q. What did you estimate the gas content per acre to be? A. I did not make any calculation of that kind" (R. 1220).

• • • • • •

"Q. By Mr. Davies: What was your estimate per acre? A. I told you I did not make an estimate; I did not use that.

• • • • • •

Q. Well, if there was no gas in that acreage at all it would have no value for gas purposes, would it? A. No, but we don't know that, and we assume there is; and from the wells that have been drilled in the neighborhood I figure that that is valuable territory and could be sold as such" (R. 1221).

• • • • • •

"Q. In other words, you put down no figures then in calculating the quantity of gas per acre in the various sections of the State of Ohio. A. No, sir, not in that way; I did take into consideration, however, the volume of gas that this producing territory was able to turn out.

Q. You did take into consideration the volume of gas? A. Yes, sir.

Q. And applying your experience to that volume, together with the quantity of acreage, you arrived at a figure; is that right? A. Yes, sir, after going over their maps and finding the locations of the producing wells, the general trend of this territory that they asked us to value, and with my experience that I have had in buying and selling, and my knowledge of sales, I think I was able to put a valuation on it.

Q. Now then, how did you turn that information into dollars, for instance? A. I would say largely by what has—what territory has—what I have paid for territory and what I have sold it for and what others have bought it for and paid for it more than any other thing, established or helped me with the other data that I have to place a valuation on it" (R. 1222).

• • • • • •

"Q. And that price idea is what you had in mind in converting your volume information into dollars, of course? A. I would not just say it that way, because I know that you have got to have money for this gas, but I know that it is a territory that I was trying to put a value on; I have got to have enough money to justify it; now then——" (R. 1223).

. . . . . .

"Q. Mr. Meals, what estimate of gas content did you arrive at for classes 3 and 4 which you grouped together? A. I did not calculate it at any; I used the valuation from the territory itself and the location of it and the possibilities that I considered were there, and did not make any calculation.

. . . . . .

Q. Now what factor did you use in converting this information or this judgment in reference to gas content of 3 and 4 into dollars per acre; what was your factor there? A. Well, there were quite a number of them; as I told you before, the Clinton sand and its ability to produce, and produce for a long time, and I took into consideration the average size of the wells that they have been able to find, and of course I had to figure the volume of these wells, the output of these wells, as a factor, but summing it all up it would be, in my judgment, a value of the acreage somewhat like you might say to a farmer: 'How much grain were you able to get from that acre of ground out there on this farm?' Now, if you were buying a farm you would want to know about how productive it was; if I was going to buy this acreage I would have to know how productive it was of gas, on that I would assume and take it into consideration that this proven acreage would be something like the acreage that had been drilled" (R. 1228-1229).

"Q. Where would such purchasers find a market for that gas outside of public utility in Ohio? A. Outside of public utility; I assume—" (R. 1259).

. . . . . .

"Q. All right, leave it stand as it is. A. Outside of public utilities there would be quite a lot of industrial markets for gas, but on the way to some other market they could pick that up. I think there are better markets at a higher price farther on.

Q. There is no out of utility market for that consumption in Ohio now, is there? A. They could use all of that amount of gas if the price were right in your Youngstown district.

Q. If the price were right? A. Yes, but you would have to compete with other fuels in that section. Now, as you go farther north you will find a high price. For instance our people at one of their plants are paying 60 cents for their industrial gas now". (R. 1259).

. . . . . .

"Q. You have never had a field in any manner comparable to the size of the field of the Ohio Fuel Gas Company for domestic purposes? A. Not for domestic. We handle as much gas, however, as the Ohio Fuel does, in industrial and domestic.

Q. But you sell most of your industrial to affiliated Carnegie Companies, do you not? A. Yes, sir.

Q. Practically in the family, isn't it? A. Yes, sir" (R. 1260-1261).

. . . . . .

"Q. And Mr. Meals, do you practically agree with Mr. Dally and Mr. Wittmer in their general estimate that there is about 4,000,000 cubic feet of gas per acre in what has been designated as No. 1 operated acreage? A. I can't exactly answer that, because I haven't figured out or had it figured out to me. It has all been

told to me by parties who have calculated it that the average in Ohio was somewhere between four and five million feet per acre. There are others who figure it higher than that. You will find lots of places in Ohio where it does run much higher.

Q. Sure. A. But the average they claim is from four to five. I never calculated it" (R. 1244).

* * * * * * *

"Q. Mr. Meals, did you fix in the value that you have given here in this case those values on the leases or upon the gas content? A. On the leases" (R. 1249-1250).

Mr. Dally testified as follows:

"Q. * * * What do you understand by market value? A. Well, I presume market value means a willing seller and a willing buyer making a trade between themselves for a piece of land, or whatever it may be.

Q. Can you conceive of a market value without a willing seller? A. Yes. There can be a fellow that wants to buy it, but he may not get—" (R. 1108).

* * * * * * *

"Q. (By Mr. Turner): Mr. Dally, taking into consideration no regulated prices of any kind for gas, taking into consideration no prices whatever for natural gas I want you to give to this Commission your opinion of the value of these gas lands, based only upon the value of the gas therein as a competitive figure? A. I think the value of all the lands is fair value between a willing buyer and a willing seller, even though they had no market or price.

Q. Well, what I am trying to get at is whether or not as a competitive fuel simply, these lands are worth the prices that you have put upon them? A. I believe they are.

Q. (By Commissioner Bricker): Would they be worth any more? A. They might be worth more, but that would be dependent on the further development of the lands, and possibly the rate would come in there, or the market that you could sell the gas in.

Q. Do you feel that regulation or fixed rates has in any way affected the value of these leasehold interests? A. Well, I can't answer that question to that fixing the value of them, whether rates are regulated or not, but they have a value outside of the regulations.

Q. Well, has regulations affected that value in any way? A. Well, you refer to the regulation of the——

Q. The fixing of rates either by municipalities or by this Commission or other Commissions, yes. A. Well, it has in a measure, yes, sir.

Q. In what way? A. It puts the property and the whole company's destiny up against the views of the Commission or the regulation of whatever they may be, and limit their possibilities.

Q. And how is that reflected in the value which you placed upon this acreage? A. Well, my valuations were placed outside of that.

Q. You didn't take into consideration the fixing of the price of gas to the public? A. No, sir.

Q. In arriving at your valuation? A. No, sir" (R. 1125-1126).

* * * * * *

"Q. Mr. Dally, from what you said in re-direct examination, I would gather that your idea of the price for gas would be a price governed by its competitive value with other fuels? A. Yes, sir.

Q. And that is the price that you had generally in mind in making your estimate? A. I did.

Q. And that would be a price as you think of it as being outside of public utility service? A. Yes, sir" (R. 1143-1144).

* * * * * *

"Q. Do you entertain the view that there is, in Ohio, an unregulated market for competitive fuels, for gas? A. I believe there is.

Q. So that, Mr. Dally, the practical limit of your rate is in the competitive market with other fuels, as I understand it? A. For industrial purposes.

Q. For industrial purposes? A. Yes, sir.

Q. And if that be true how is that reflected in your leasehold value? A. My values are arrived at with that in view" (R. 1145).

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"Q. What other controlling factor did you take into consideration from that standpoint in making your valuation? A. Well, a very strong factor that is used; I used and use it, is the expected yield of gas lands.

Q. The expected yield of gas lands? A. Yes, based on what they have done over a period of years.

Q. Based on their performance? A. On the performance, the amount of gas that is produced; and that sometimes is put into acres, that is the amount of gas produced per acre over an area of your holdings; and from that yield I would make up my mind as to the value of this property or any other property that might be submitted with the same information.

Q. What that property would bring on the market? A. Yes, sir" (R. 1093-1094).

• • • • • • •

"Q. And what market price did you have in mind, what rate price did you have in mind when you were fixing the value in this case? A. I didn't find the rate price in connection with this" (R. 1096).

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"Q. (By Commissioner Geiger): Did you find what the rate should be in seeking knowledge as to what rates were other places, is that the way you arrived at it? A. With regard to this rate?

Q. Yes. A. No, sir. No, I didn't take it from that standpoint.

Q. (By Mr. Davies): How much were you influenced by the price of 60 or 65 cents that you just spoke about that was prevailing in Pennsylvania. A. I wasn't influenced by that. In figuring this value up here, I made the calculation from what I would expect the property to produce in cubic feet yields.

Q. Yes. A. And I didn't put a price per thousand on my figures to arrive at the calculation.

Q. Wouldn't it be necessary for you to have some idea as to price after you get the quantity? A. No, not necessarily to fix any particular price" (R. 1097).

* * * * * *

"Q. But you did use some comparable figure to that? A. Oh, yes, I figured the average should be worth $90 an acre; if I was buying it, or if I was selling it to some other fellow" (R. 1099-1100).

* * * * * *

"Q. (By Mr. Davies): And you figured that price of $90 per acre for the 291,396 acres; that was the amount of operated acreage submitted to you? A. Yes, sir; the buyer could afford to pay that for the property, a willing seller and a willing buyer.

Q. Would pay $90 an acre for No. 1 and $100 an acre for No. 2? A. Yes, sir" (R. 1100).

* * * * * *

"Q. Yes, but you had gas when you got through finally specifying about what you could get per acre; how did you reduce a gas quantity to money? A. Well, I didn't reduce it" (R. 1128).

Mr. Wittmer testified as follows:

"Q. (By Mr. Davies): Mr. Wittmer, in arriving at that valuation per acre, what factors did you use, in

other words, how did you arrive at that figure? A. Well, that may be rather difficult to explain. The round figures of $75 per acre I would say were arrived at principally after estimating the probable recovery of gas, what gas lands of those classifications usually bring in the open market, the type of territory, the producing sand and many other things" (R. 1164).

• • • • • •

"Q. Well, did you, as a matter of fact, so figure it? A. I don't believe that I can truthfully say that I did. I based that estimate more on one of the other factors; the factor of going value of leaseholds of that classification.

Q. What do you mean by going— A. For which they could be bought or sold.

Q. For which they could be bought or sold; No. 2 acreage? A. Yes.

Mr. Turner: As I understood it applied to all.

Mr. Davies: No, I was just directing his attention to No. 2" (R. 1164-1165).

• • • • • •

"Q. Do I remember correctly that you said this morning that No. 3 and No. 4 acreage were practically not saleable? A. Oh, no.

Q. You didn't say that? A. Oh, no, indeed; I don't think I did" (R. 1167).

• • • • • •

"Q. What figure did the price for which gas sells have to do with your valuation? A. None whatever.

Q. Nothing whatever; if gas was selling in a market at 20 cents, and that was the general market price for gas, would that have any influence with you in arriving at your value of a gas leasehold acreage? A. Not in this case.

Q. Why not in this case? A. Because, natural gas in Ohio as well as in Pennsylvania, New York, and

West Virginia has always had a market; it has never gone begging" (R. 1170).

• • • • • • •

"Q. Well, would the amount that you could get in your market have some figure? A. The amount of gas?

Q. The price that you would get for gas in any of these markets that you are talking about, cut some figures in the value of gas leasehold acreage? A. It should.

Q. It should? A. Yes.

Q. And it would, of course, wouldn't it? A. If I didn't make myself clear, for my purpose in arriving at these figures I assumed that gas was just what it always has been.

Q. Well, what has it always been? A. It has been the finest fuel in the world; it has never had to seek a market, the markets seek it.

Q. At what price? A. At a reasonable price in comparison with any other fuel.

Q. Then you were calculating then the price from the standpoint of a gas as a competitive fuel in an unregulated market; is that right? A. Well, I presume so, yes.

Q. That would be the highest price that you could hope to obtain for gas from the standpoint of a competitive fuel? A. Yes.

Q. In an unregulated market. If it was in a utility market, then what? A. I wouldn't be interested" (R. 1171).

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"Q. (By Mr. Davies): So if I understand you right, Mr. Wittmer, you arrived at your valuation here as you have indicated by the application of your general experience and general observation, and the general examination of the information submitted to you, in the amounts as are indicated on page 19 of exhibit 44,

namely, class No. 1 operated 291,396 acres, $21,825,000, class No. 2 unoperated 164,739 acres, $1,230,000; class No. 3 unoperated 312,631 acres, $3,120,000; class No. 4, unoperated 2,065,421 acres, $6,193,000, making a total of $43,440,000? A. It is" (R. 1174).

"Q. You wouldn't be interested; you are only interested in non-utility markets, is that right? A. Well, I am only interested in a non-utility market because there is no money in a utility market.

Q. There is no money in a utility market? A. We have never been able to make any money.

Q. Well, if this leasehold acreage was committed to a utility market, what effect would that have on the leasehold acreage value? A. Well, I don't know just how much regulation there might be. If it would be regulated to the point of putting the gas producer out of business.

Q. What did you mean when you said what you said a moment ago? A. Because I would particularly cater to an unregulated market, that doesn't say that if there was only a regulated market that it would have to be a confiscating market, a market that would be confiscatory. I don't believe that would hardly be permissible, and I can't conceive of anything like that" (R. 1171-1172).

"Q. All right. A. We must keep in mind a lot of things in connection with natural gas as a competitive fuel. I said a moment ago, it is the finest fuel that has ever been produced, whether it is for industrial, manufacture or home use. In competition with other fuels I don't believe that there is any comparison at present market prices, and when I put a price on lease-

holds that have a probable recovery of 1,000,000 or 10,000,000 feet of gas per acre, it is on the theory that natural gas, without any serious competition, can always be marketed. When we were in the domestic business as a utility, and when we were supplying gas to industrials, the industrial business was always very much better business than the domestic business. We wouldn't think of distributing gas to domestic, only we were a utility and were compelled to do it. We would have gone out of business very early if it hadn't been for the industrial business that kept it going. I don't believe that natural gas will ever go begging anywhere . . .'' (R. 1174).

. . . . . .

Q. Now, just what is your company; is it a drilling company or a transportation company or a selling company or a brokerage company? A. A producing company.

Q. A producing company. Now, do you transport gas, transmit gas? A. Not at this time.

Q. And do you sell it as a public utility? A. No'' (R. 1203-1204).

Mr. Webber testified as follows:

''Q. Well, you did consider the gas content? A. Of course I did in arriving at what those acres would sell for to somebody, but I don't think in the final estimate I took any amount of those acres and I figured it as to the volume of gas to put a price on it; I found about what the acres in my mind contained, and then what would that be worth in the open market'' (R. 1282).

. . . . . .

''Q. Well, how did you convert the estimated gas content as you suggested on Nos. 1, 2 and 3 into the acreage prices that you have submitted? A. As I

stated, after taking them together, what would I feel perfectly safe in offering them to a willing buyer, and except to receive that price" (R. 1283).

. . . . . .

"Q. I think I inquired of you yesterday afternoon as to the factor of gas content that you assumed in connection with the gas acreage; how did you convert that, together with the other factors, into dollars per acre? A. I took the amount of gas that I estimated was in those sands per acre, then concluded in my mind what I could take that acreage and offer it to a willing purchaser and receive per acre for it.

Q. You conceived in your mind that you could do that? A. That, I felt confident could be done if offered to a willing purchaser" (R. 1295).

. . . . . .

"Q. Were you basing your valuation in 1929 upon what a willing buyer would pay a willing seller? A. I was" (R. 1316).

. . . . . .

"Q. Did you put a value upon the gas content or upon the leases as leasehold rights?

The Witness: My value was given on the leasehold acreage" (R. 1306).

Webber's testimony, quoted at pages 140-41, *supra*, is also pertinent to the question here under consideration.

III. Further Extracts Showing, Generally, that the Values Proved Were the General Market Value of the Premises.

Mr. Dally testified as follows:

"Q. Do you imagine that the Ohio Fuel Gas Company on June 30th, 1929, was a willing seller of its leasehold acreage? A. I can't say that they were.

Q. You don't know of any such leasehold acreage comparable in size, extent, production and quality that was offered on the market at June 30th, 1929, do you, in Ohio? A. Well, I don't know of any in Ohio. In other parts of the country there were" (R. 1108).

* * * * * *

"Q. Could you get an offer for all of this property? A. Well, give me time enough I think I could——

Q. Well, can you get an offer within 24 hours for it? A. I believe I could" (R. 1129).

* * * * * *

"Q. (By Mr. Davies): Do you know, Mr. Dally, of any sale in Ohio in the immediate past of leasehold acreage in any way comparable with this whole leasehold acreage under consideration now? A. The company I am with, or one of the companies here, made a purchase—I will have to answer that this way——

Q. You can answer— A. They made a purchase, but I don't know how it compared to this; but it paid some pretty good prices for gas territory. I don't know how they compared with this" (R. 1109).

* * * * * *

"Q. * * * I am asking you about how you arrived at $90.00 per acre for leasehold No. 1, and a hundred dollars for leasehold No. 2 without applying a price basis. A. I have answered that question by stating the amount of gas per acre in my opinion, over the drilling of Ohio territory——

Q. Yes, but you had gas when you got done with that, didn't you? A. And I could use any figure to arrive at a value you know" (R. 1127-1128).

* * * * * *

"Q. You have it at $90.00 an acre and a hundred dollars an acre and twenty dollars an acre on the third

class and $2.00 an acre on the fourth? A. Well, the natural gas business of Ohio to some extent has established values and the cost of gas lands and the value of them from producing expense and supplying gas over this state.

Q. Yes, and in supplying gas you had to take into consideration what the gas was sold for? A. Yes, and in buying it you have to do that. I think a man could buy the property at these figures and sell gas at a competitive rate against other fuels; that is my opinion.

Q. Well, in the last analysis you did have to use a price, didn't you, for the gas; you had to use a key price in order to build up the amount which you ascribe here as a valuation on leaseholds No. 1, 2 and 3? A. No; I used my quantity price, or quantity of yield; and the price arrived at here is what I thought I could afford to pay in buying the property from one who is willing to sell it to me; I could pay that price for that property and go along and make some money on it" (R. 1128).

Mr. Webber testified as follows:

"Commissioner Geiger: Do you think you could go out and sell it (Class No. 2 leaseholds) at that time in the market and especially in conjunction with the other acreage, No. 1, 3 and 4, at what would be an estimated value of $100.00 an acre, less its then depreciation?

The Witnes: Yes, sir.

Commissioner Geiger: And that you could do because the common experience of gas men would indicate that that would be their relative value?

The Witness: Yes, sir.

Commissioner Geiger: Even though no wells were dug?

The Witness: Yes, sir" (R. 1313-1314).

Mr. Meals testified as follows:

"Q. And if it develops that it is a large producing territory does that make the lease more valuable or not? A. Oh, yes, if it is a large producing territory, why, it is more valuable." (R. 1222).

"Q. Are there companies or individuals who are engaged in the business of gathering leases on prospective gas properties for the purposes of selling them to other larger companies, either blocks or otherwise? A. I know of no companies. I know of quite a number of individuals that make that a practice of leasing up blocks and selling them to whoever they can" (R. 1242).

"Q. Then if that is the case, what valuation per acre do you put on what has been generally designated here as No. 2, where there are no wells drilled? A. If that acreage was for sale today, it would bring a much higher price than I put on it.

The Witness: Well, it would bring more than $100 an acre; at least that" (R. 1245).

Mr. Wittmer testified as follows:

"The Witness: (In answer to a rather lengthy question by one of the commissioners) The best proof of that is this, if we try to buy or sell No. 3 we cannot either get or sell for anything like the price that you can for No. 2, but you can with No. 2. Now that is the thing that governs the value. That is the only way I can explain it; it is a practical problem. If we try to sell No. 3 for the price of No. 2 we cannot do it.

Q. By Mr. Davies: Why not? A. Well, we cannot get it.

Q. Because the gas men don't believe the gas is there? A. I presume, yes, sir, I presume—and if we don't believe it is there we would not buy it" (R. 1153).

"Q. You said you thought you had about 25 wells in about 10,000 acres, didn't you? A. About, yes.

Q. Well, is that substantially correct or do you mean you are so uncertain about it you can't tell from morning till afternoon which it is? A. I am rather uncertain about it, I will admit that. We have been operating and we have been selling our property and we have been buying property, and it is very difficult for me to remember those things" (R. 1165-1166).

* * * * * * *

"Q. What element then did you use in No. 3, Mr. Wittmer, in arriving at your value of $10 per acre? A. Principally the going value of lands of that type, that classification.

Q. Going value; I don't just understand what you mean by that. A. For what they can be bought and sold" (R. 1166).

* * * * * * *

"Q. You arrived at it then from the standpoint of what you or your company would be willing to do; is that right? A. Yes, that was one of the factors.

Q. Well, what other factor? A. Any other company.

Q. Your judgment is that any other company would be willing to do the same thing that you would do? A. In my judgment other companies have done so, and we have done so" (R. 1167).

* * * * * * *

"Q. You depended largely on your experience and observation in all fields, all the gas fields that you have been drilling, is that right? A. That is true; but the prices arrived at here were based on Ohio conditions and values that you would apply on leases in Pennsylvania or New York State were entirely different" (R. 1169).

APPENDIX B

Applicable Statutory Provisions

Valuation of property to determine justice of rates

"Sec. 499-8. The commission, for the purpose of ascertaining the reasonableness and justice of rates and charges for the service rendered by public utilities or railroads of this state, or for any other purpose authorized by law may investigate and ascertain the value of the property of any public utility or railroad in this state, used or useful for the service and convenience of the public. • • •

Sec. 499-9. The commission shall prescribe the details of the inventory of the property of each public utility or railroad in the state; and such inventory shall include all the kinds and classes of property, with the value of each, owned by each public utility or railroad, used and useful for the service and convenience of the public. In ascertaining the value of the various kinds and classes of property of each public utility or railroad, the commission shall have authority to ascertain and report in such detail as it may deem necessary as to each piece of property owned or used by such public utility or railroad to show separately the following facts:

A. The original cost, if any, of each parcel of land owned and used by such public utility or railroad, and a statement of the conditions of acquisition; whether by direct purchase, by donation, by exercise of the power of eminent domain or otherwise.

B. The value as of a date certain, of each parcel of land owned and used by such public utility or railroad, by comparison with the value of contiguous and neighboring parcels of land, and land of similar character as to location and use.

• • • • • •

D. The cost of new production as of a date certain, of all physical property other than land, owned and used by such public utility or railroad, showing the values of the separate items comprising such property, together with the unit basis of such valuation.

E. Depreciation, if any, from the new reproductive cost as of a date certain, for existing mechanical deterioration, for age, for obsolescence, for lack of utility or for any other cause, the percentage and amount of each class of depreciation, if any, to be specifically set forth in detail.

F. The net value as of a date certain, of all physical property other than land owned by such utility or railroad, to be derived by deducting the sum of the amounts of depreciation from the sum of the new reproductive costs.

G. If there shall be any additional value given to the value of the property of a public utility or railroad due to the possession of a franchise to perform a public service, or for good will or for financing, such additional value shall be separately and specifically set forth, together with the basis for the computation or estimate of such additional value.

. . . . . .

Ohio State university engineers and experts may be employed

Sec. 499-13. . . . Whenever the authority is conferred or the obligation imposed by law upon the commission to ascertain the value of any public utility or railroad, such valuation under such authority or obligation shall be made in accordance with the provisions of this act. . . .

System of accounts may be established for public utilities

Sec. 499-14. The commission shall have power to establish a system of accounts to be kept by the public utilities or railroads (including municipally owned or operated utilities), or to classify said public utilities or railroads and to establish a system of accounts for each class, and to prescribe the manner in which such accounts shall be

kept; * * * Where the commission has prescribed the forms of accounts, records or memoranda to be kept by any public utility or railroad for any of its business, it shall thereafter be unlawful for such public utility or railroad to keep any accounts, records or memoranda for such business other than those so prescribed, or those prescribed by or under the authority of any other state or of the United States, excepting such accounts, records or memoranda as shall be explanatory of and supplemental to the accounts, records or memoranda prescribed by the commission. * * *

Order m be rever

Sec. 544. A final order made by the commission shall be reversed, vacated or modified by the Supreme Court, on a petition in error, if upon consideration of the record such court is of the opinion that such order was unlawful or unreasonable.

Transcr

Sec. 546. Upon service or waiver of the summons in error the commission shall forthwith transmit to the clerk of the Supreme Court a transcript of the journal entries, original papers or transcripts thereof and a certified transcript of all evidence adduced upon the hearing before the commission in the proceeding complained of, which shall be filed in said court.

Jurisdic

Sec. 549. No court other than the Supreme Court shall have power to review, suspend or delay any order made by the commission, or enjoin, restrain or interfere with the commission or any member thereof in the performance of official duties. Nor shall the writ of mandamus be issued against the commission or any member thereof by any court other than the Supreme Court.

Penalty failure comply orders

Sec. 614-64. Every public utility or railroad and every officer thereof, shall obey, observe, and comply with every order, direction and requirement of the commission, made under authority of this act, so long as the same shall be and remain in force. Any public utility or railroad herein de-

fined which violates any provision of this act, or which after due notice fails, omits, or neglects to obey, observe, or comply with any order or any direction or requirement of the commission officially promulgated shall forfeit and pay to the state not to exceed one thousand dollars for each such failure, omission or neglect and each day's continuance thereof shall be deemed and held to be a separate offense.

nalty

Sec. 614-65. Whoever being an officer, agent or employee in an official capacity, of a public utility or railroad defined in this act, knowingly violates any provisions of this act, or wilfully fails, omits or neglects to obey, observe or comply with any lawful order or direction of the commission made with respect to any public utility or railroad shall be fined not less than one hundred dollars nor more than one thousand dollars, or imprisoned not more than two years, or both, and each day's continuance of such failure, omission or neglect shall constitute a separate offense."

(This case is governed by the Pence Law, Section 614-20, General Code, 110 Ohio Laws 366, which has now been superseded by a section of the same number, 113 Ohio Laws 17.)

"Sec. 614-20 (Pence Law, 110 Ohio Law 366). Unless otherwise ordered by the commission, no change shall be made in any rate, joint rate, toll, classification, charge or rental in force at the time this act takes effect, or as shown upon the schedules which shall have been filed by a public utility in compliance with the requirements of this act, or by order of the commission, except after thirty days' notice, in writing, to the commission, which notice shall plainly state the changes proposed to be made in the schedule then in force, and the time when the change, rate, charge, toll, classification, or rental shall go into effect; and all proposed changes shall be plainly indicated upon

existing schedules, or by filing new schedules thirty days prior to the time when they are to take effect, but the commission may prescribe a less time when they may take effect, provided, however, that if the proposed change shall effect an increase in the rate, joint rate, toll, classification, charge or rental, notice, in form approved by the commission, published once each week for three consecutive weeks before the effective date thereof, unless the commission shall authorize a less time, shall be given by publication in a newspaper published at the county seat of each county in which such change applies, and of general circulation therein, or in one newspaper published in, and of general circulation throughout the territory in which such utility operates. Such published notice shall set forth the fact that such application has been made, the effective date of the proposed new schedule, the name and location of the agent of the utility in such county or territory where a copy of such proposed new schedule may be inspected by any interested party; and provided, further, however, that such utility shall at the time of the filing of the schedule with the commission, place on file with such agent of such utility a copy of the proposed new schedule and keep the same on file for the inspection of any interested party pending the hearing before such commission.

Whenever there shall be filed with the commission any schedule affecting an increase in any rate, joint rate, toll, classification, charge or rental, or stating any new regulation or practice affecting any existing rate, joint rate, toll, classification, charge or rental in force at the time this act takes effect, the commission shall have, and it is hereby given authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other form of pleading by the interested public utility, but upon reasonable notice, to enter upon a hearing

concerning the propriety of such rate, joint rate, toll, classification, charge, rental, regulation or practice; and pending such hearing and the decision thereon, the commission upon filing with such schedule and delivering to the public utility affected thereby, a statement in writing of its reasons for such suspension, shall suspend the operation of such schedule and postpone the use and operation of such rate, joint rate, toll, classification, charge, rental, regulation or practice; but not for a longer period than one hundred and twenty days from the time when such schedule was filed with the commission; and after a full hearing, whether completed before or after the rate, joint rate, toll, classification, charge, rental, regulation or practice goes into effect, the commission may make such order in reference to such rate, joint rate, toll, classification, charge, rental, regulation or practice as would be proper in a proceeding initiated after the rate, joint rate, toll, classification, charge, rental, regulation or practice had become effective; provided, that if any such hearing cannot be concluded within the period of suspension, as above stated, such rate, joint rate, toll, classification, charge, rental, regulation or practice shall go into effect at the end of such period of suspension upon the public utility filing with the commission a bond, undertaking or other security, to the satisfaction of the commission, securing and guaranteeing the repayment, with interest at the rate of six per centum per annum from the date of payment by the consumer to the date of repayment by the utility, to all the consumers of such portion of such increased rate, joint rate, toll, classification, charge or rental, collected by such utility as the commission, upon final hearing, may determine to have been unreasonable or excessive, which repayments shall be made at such times and in such amounts as the commission shall order, and shall be promptly paid by said utility to the corporations

or persons entitled thereto, and in such manner as the commission may prescribe, and if any such money ordered by the commission to be repaid shall not have been claimed by the corporations or persons entitled thereto, within one year from the time the same shall become due and payable in accordance with the order of the commission, all such moneys shall be paid by the utility to the treasurer of the county, or other political subdivision, in which such new schedule is effective for the benefits of its general fund, in such amounts and in such manner as the commission may order; and thereafter such public utility shall not be liable therefor. Such bond, undertaking or security shall be in such amount as the commission may from time to time determine; provided, however, that the amount fixed at any time shall not, in addition to the amount of such increase or other charge made by the utility already accrued, exceed the estimated amount of such increase or other charge made by the utility extending over a period of one year, based upon the business of the utility for the previous year, or be less than one-half of such estimated amount.

All rates, joint rates, tolls, classifications, charges or rentals, of a public utility heretofore or hereafter fixed and determined by any order of the commission under the provisions of this chapter shall be in force and be prima facie lawful for two years from their effective date or until changed or modified as provided by law; provided, however, that after any such rate, joint rate, toll, classification, charge or rental shall have been in force for a period of two years, the same may be changed by the public utility affected in the manner provided in this section; and that nothing herein contained shall be construed as in any way affecting the right of any person or public utility to make application, as provided in sections 614-21 and 614-23 of the General Code or otherwise as provided

by law, for an order rescinding, altering or amending any order of the commission within said two year period or thereafter.

At any hearing involving a rate increased or sought to be increased after this section shall have become effective, the burden of proof to show that the increased rate or the proposed increased rate is just and reasonable shall be upon the public utility and the commission shall give to the hearing and decision of such question, preference over other questions pending before it; and decide the same as speedily as possible."

"Sec. 5483. * * * In the month of October, annually, the auditor of state shall charge, for collection from each electric light, gas, natural gas, waterworks, telephone, messenger or signal, union depot, heating, cooling and water transportation company, a sum in the nature of an excise tax, for the privilege of carrying on its intra-state business, to be computed on the amount so fixed and reported by the commission as the gross receipts of such company on its intra-state business for the year covered by its annual report to the commission, as required in this act, by taking one and thirty-five one-hundredths per cent. of all such gross receipts, which tax shall not be less than ten dollars in any case.

Sec. 2294-4. * * * For the purpose of providing funds for poor relief and of the carrying out of the other purposes and provisions of this act, a sum in the nature of an excise tax for the privilege of carrying on its intra-state business in the amount of one per centum of the gross receipts of each electric light, gas, natural gas, waterworks, telephone, messenger or signal, union depot, heating, cooling, water transportation, and telegraph company, on its intra-state business from and after the effective date of this act, as covered by the annual reports required by law to be filed by all such companies as are herein before men-

tioned in the years 1932, 1933, 1934, 1935, 1936, 1937, is hereby levied and imposed upon each such company in each of said years, such tax to terminate five years after the final date covered by the annual report filed by each of such companies in the year 1932; . . . The sum so levied to be in addition to the taxes provided for in Sections 5468, 5483, 5485 and 5488 of the General Code, and to be collected on the dates and in the manner provided in said sections (114 Ohio Laws, Part II, 19).

Sec. 8623-16. . . . A corporation, by action of its board of directors, subject to preemptive rights, if any, of shareholders, may, also, for the purpose of marketing shares, issue and sell shares having par value at such a discount from the par value thereof as would amount to, or not exceed reasonable compensation for the sale or underwriting of such shares, which discount shall be treated as cost of organization or financing.

Upon sale of such shares or issue of shares, upon conversion of such securities, or exercise of such option rights, the corporation shall include the par amount of such shares in its stated capital.

. . . . . .

Sec. 8623-38. . . . Whenever the board of directors of a corporation shall be of the opinion that its assets, including patents or good will, have a fair value to the corporation in excess of the amount at which they are carried on its books, and shall determine the amount of such fair value, it may order all or a part of the fair value so determined to be entered on its books and thereby create an excess of assets, which the board of directors may apply to a dividend in shares of the corporation and transfer to stated capital or apply to an increase of stated capital represented by shares without par value."

APPENDIX C

Applicable Commission Regulations

(From the Uniform Classification of Accounts for Natural Gas Utilities, prescribed by the Public Utilities Commission of Ohio, pursuant to Section 499-14, effective January 1, 1921.)

"ORDER

At a Regular Session of the Public Utilities Commission of Ohio, held at Columbus, Ohio, on the first day of April, 1920.

In the Matter
of
A Uniform Classification of Accounts for Natural Gas Utilities.

Administrative Order No. 44.

The Commission, acting under the laws of Ohio relating to public utilities, including municipally owned or operated utilities, and in the exercise of the powers conferred upon it by law, and after due notice to all public utilities to be affected thereby, including municipally owned or operated utilities, deeming it advisable, after full investigation, to establish a system of accounts and records to be used and kept by all public utilities, engaged in the generation, transmission or sale of natural gas, including municipally owned or operated natural gas utilities, it is, therefore,

Ordered, That the system of accounts and records, fully set forth and described in a pamphlet, identified and designated as, 'A Uniform Classification of Accounts for Natural Gas Utilities,' said pamphlet and all of its contents being referred to herein, hereto attached and made a part hereof be, and the same is hereby established and prescribed

as the system of accounts and records to be kept and used by each and all of said utilities. It is further

ORDERED, That each such utility of each class, as the same is designated in said pamphlet, shall carry on its books, the accounts and records herein prescribed for a utility of that class, and shall accurately keep such accounts in accordance with the requirements, definitions and instructions contained and set out in said pamphlet. It is further

ORDERED, That this order shall take effect on January first, 1921, and shall continue in force until suspended, modified or set aside by this Commission.

THE PUBLIC UTILITIES COMMISSION OF OHIO,
C. C. MARSHALL, *Chairman,*
B. W. WALTERMIRE,
B. M. CLENDENING,
Commissioners.

A true copy:

G. C. MAXWELL,
Secretary.

(SEAL)

"100. FIXED CAPITAL INSTALLED PRIOR TO JANUARY 1, 1921.

Charge to this account the book value, at the close of December 31, 1920, of all fixed capital owned and used by the utility in the conduct of its natural gas operations. No charge shall be made to this account for any fixed capital acquired after December 31, 1920. * * *

101. FIXED CAPITAL INSTALLED SINCE DECEMBER 31, 1920.

Charge to this account the cost of all fixed capital installed since December 31, 1920, and used by the utility in the conduct of its natural gas operations.

This account is a controlling account for accounts 200 to 267 inclusive.

When any item of fixed capital carried in this account is retired from service, the utility in recording this retirement shall follow as far as applicable the procedure outlined in the second paragraph of account 100.

184. Amortization of Other Capital Reserve.

Credit to this account and charge to '447. Amortization of Franchises, Patent Rights and Licenses,' '478. Amortization of Natural Gas Rights and Gas Leases' and '609. Amortization of Interests in Landed Capital' accounts those amounts which, through regular application, will provide at the expiration of the lives of the utility's limited franchises, patent rights and licenses, limited rights of way, and leaseholds, a reserve equal to their original money cost.

When the original money cost of any such item of capital has been completely amortized, charge to this account and credit to the account in which it is carried the amount of it.

205. Leaseholds.

Charge to this account the first cost to the utility of acquiring leaseholds of land, structures, or equipment used by the utility in the production of natural gas.

Exclude from this account the cost of leaseholds which terminate in one year or less after they become effective. Exclude also rents paid periodically for rights obtained under leases.

In this classification this account represents interests in land and as such should be amortized during the lives of the leaseholds.

207. Natural Gas Rights.

Charge to this account the first cost to the utility of purchasing natural gas rights. This account is intended to

provide for the cost to the utility of obtaining ownership in gas underlying land not owned or leased by the utility. It does not provide for gas rights which are leased and which are properly chargeable to '205. LEASEHOLDS' account.

In this classification this account represents interests in land and if the rights charged hereto are limited in life should be amortized during the lives of the rights.

359. GAS WELL ROYALTIES—(Classes A, B and C).

Charge to this account the amounts of royalties paid for natural gas produced by the utility from land owned by others.

The records supporting the entries to this account shall be so kept that the utility can furnish information as to the name of each party to each contract involving royalties, the terms of each contract, the location of each gas well operated on a royalty basis, the methods of determining royalties paid, and the amounts of royalties paid in agreement with the terms of each contract.

360. RENTALS OF UNOPERATED LEASES—(Classes A, B and C).

Charge to this account the amount of rent accrued during each accounting period on gas leases which are being held by the utility for future production of natural gas.

The records supporting the entries to this account shall be so kept that the utility can furnish information for each lease as to the name of the lessor and a description of the land leased by him; the period and the terms of the lease including the amount of rent payable thereunder; whether such lessor controls, is controlled by, or is in any way affiliated with the utility; whether the rent is payable in cash or is disbursed by the utility for the lessor as interest on funded debt, guaranteed dividends on stock or otherwise.

478. AMORTIZATION OF NATURAL GAS RIGHTS AND GAS LEASES —(Classes A, B and C).

Charge to this account and credit to '184. AMORTIZATION OF OTHER CAPITAL RESERVE' account that amount which, through regular application, will provide at the expiration of the utility's natural gas rights and gas leases, a reserve equal to their original money cost.

600. RENT FOR LEASE OF NATURAL GAS SYSTEM PROPERTIES— (Classes A and B).

Charge to this account and credit to '177. OTHER ACCRUED LIABILITIES' account the amount that accrues during each accounting period on the natural gas system properties of others held and operated by the utility under a form of lease whereby it enjoys the exclusive use and possession of such properties.

The records supporting the entries to this account shall be so kept that the utility can furnish for each lease, information as to the name of the lessor, the kind of property leased by him, and the utility function that it performs; the terms and the period of the lease and the amount of rent payable thereunder; whether such lessor controls, is controlled by, or is in any way affiliated with the utility; whether the rent is payable in cash, or is disbursed by the utility for the lessor as interest on funded debt, guaranteed dividends on stocks or otherwise."

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 609

THE DAYTON POWER & LIGHT COMPANY,
Appellant,

v.

THE PUBLIC UTILITIES COMMISSION OF OHIO,
Appellee.

REPLY BRIEF OF APPELLANT

Preliminary Observations

The answer to the question presented by this appeal are vital to appellant, and to a large number of residents of Ohio who are dependent upon it for their gas supply. The import and effect of the rulings made by appellee and the court below in this case are so revolutionary and far-reaching, and the appellee's brief recently filed herein contains so many assertions and assumptions not predicated on the facts and conclusions not justified by the record, that counsel for appellant feel impelled to make brief response. In limiting this reply to brief comment on a few of the many unwarranted statements and unsound arguments appearing in the brief filed on behalf of the appellee, we do not, of course, mean to approve as correct or accept as justified many other observations and contentions contained therein.

Statement of Case

(Appellant's Brief, pages 2-6; Appellee's Brief, pages 1-9)

Counsel open their brief with the remark that the appellant's statement of the case "contains certain allegations with which appellee cannot agree" which makes it necessary for them to "restate the case." Reference is made to the so-called Carpenter Act on pages 2, 3, and 148-151, which legislation they concede has nothing to do with this case, but we do not note any record facts stated at pages 1 to 9 inclusive of their brief which are not included in the brief for appellant. There is, however, incorporated in appellee's statement of the case some *argument* upon which we will comment briefly.

On pages 4-5 of their brief counsel for appellee say:

> "In its brief, appellant (p. 4) refers to its valuation of $1,250,221.00 as having been established by the 'uncontradicted evidence' and labels the amounts claimed by it and disallowed by appellee either in part or in whole, as 'appellant's proof.' If the purely speculative and conjectural testimony of witnesses on behalf of appellant, which, in fact, was nothing more than the guesses of such witnesses as to the amounts which in their opinion should be allowed for such items as organization or preconstruction cost, cost of financing, cost of cutting and restoring paving, going concern value, general overheads or undistributed construction expenditures and working capital, constitutes 'uncontradicted evidence' and 'proof' even though such speculations and conjectures violate well-established principles of law, then perhaps appellant's statements are correct, otherwise they are not."

It will be noted that all through its brief appellee characterizes the evidence in this case as "speculative," "conjectural" and "theoretical." See pages 11, 12, 14, 15, 24,

28, 29, 30, 38, 51 and other pages in the brief. Counsel apparently believe that sheer repetition of these adjectives will tend to destroy the testimony of competent, able and trustworthy witnesses whose character and reputations are such that they were not assailed by representatives of the towns, the appellee, or the court below.

On page 9 counsel say: "In its statement, appellant alleges (Appellant's Brief, p. 6) that appellee based its rate order upon conditions as they appeared to it to be on November 3, 1932, instead of as they were on July 17, 1929, the day certain," and observe they cannot agree with this statement and that appellee failed to cite any portion of the record to sustain it. On page 121 of our main brief we called attention to the statement in the opinion of appellee (R. 167) that: "The test of 'equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings' presents a new question on account of *the present depression.*" The observations made by appellee in its opinion and its finding on rate of return show conclusively that the business depression existing in November, 1932 materially influenced its action.

In their attempted defense of appellee's action in failing to allow for or take into consideration in fixing appellant's operating expenses the additional excise *tax* imposed prior to the handing down of its order in this case, counsel say (p. 16): "The action of appellee in computing the excise tax on the basis of the tax as it existed as of July 17, 1929 (the date certain) and not on the basis of a subsequent enactment of the Legislature (April 5, 1932), is, of course, sound. * * * It would be absurd to give effect in a 1929 rate study to a 1932 enactment of the Legislature."

We may observe in passing that appellee ought to be consistent and not resort to a time beyond the date certain for

the purpose of reducing the rate of return allowed appellant while ignoring positive proof regarding an increase in its operating expenses due to the imposition of additional taxes by the State. If there is anything appellee might properly take judicial notice of it is the *certainty* that *taxes* must be paid.

Organization or Preconstruction Costs

(Appellant's Brief, pages 13, 24, 25; Appellee's Brief, pages 11-12, 26-29)

None of the cases cited on page 12 of appellee's brief deal specially with organization costs, and the case of *Ohio Utilities Co.* v. *Commission*, 267 U. S. 359, 362, which does consider this precise subject matter and arose in Ohio, is not cited.

On page 25 of their brief counsel say: "If we are to reconstruct the plant of the appellant in these territories as of 1929 or 1930, it is perfectly proper to consider the remainder of the appellant company as in existence. It is equally proper to consider the public of these communities anxious and desirous of receiving the service which they now enjoy." The reaching of a satisfactory conclusion is not difficult if one assumes the desired facts and necessary premises. It is clear that the various gas plants used in serving the towns in this case may not be treated like some extension of a single plant in order to serve additional consumers in the same community.

On page 27 counsel state: "The only other decision of this Court cited by appellant to sustain its position as to this item is the case of *The Ohio Utilities Company* v. *Public Utilities Commission*, 267 U. S. 359. That case is clearly distinguishable from the instant case, for the reason that in the Ohio Utilities Company case there was evidence in the record testified to by the commission's own engineers

that an allowance for organization costs should be made." Apparently counsel would have testimony given by appellee's engineers treated on a different basis to that of other witnesses. Obviously, the "reason" given does not make the Ohio Utilities case "clearly distinguishable" from this case. In that case this Court did not hold that an allowance should be made for organization costs merely because the testimony on the matter was given by the commission's engineers, but by reason of the fact that the record contained such evidence.

Cost of Financing

(Appellant's Brief, pages 13-14, 26-34; Appellee's Brief, pages 12 and 29-24)

The conclusion reached regarding this subject on page 12 of appellee's brief is predicated on the assumption of "the absence of any evidence that any such cost has been incurred in the past or actually would be incurred in the future." No such assumption is justified in this case because the evidence clearly establishes that such costs would be incurred in the reconstruction of appellant's property.

The argument of counsel for appellee under this heading is a good illustration of begging the question, and it utterly ignores the record evidence. They say: "None of these witnesses gave any consideration to the excellent financial condition of the appellant company as a whole but assumed that they were starting out with a new company having no affiliations and no banking connections. The appellee in reaching its decision to disallow the amount claimed for cost of financing determined to consider some of the actualities rather than indulge wholly in theory." No reference is made to any evidence tending to justify this statement, and there is nothing in the record to support it.

No member of the commission, counsel, witness or other person present at the hearing offered to raise the money needed to reproduce this property without cost or even questioned the fact that the persons or company attempting to secure such necessary capital would incur substantial expense. If actualities had been given any serious consideration by appellee it would have accepted the sworn testimony of responsible men who have had the experience of raising money for the construction of similar public utilities. Should the members of the commission or their counsel attempt to raise funds even to build a home they will find that banks and other lenders of money are not begging them to accept a loan of the necessary capital. The same attitude is met with in a more pronounced degree when it comes to raising large aggregations of capital for the purpose of constructing a utility to render service to the entire community.

Counsel state on page 30 that "each witness admitted that his calculations were purely on a basis of his estimate of cost of financing," and apply their stereotyped phrase "entirely speculative and conjectural." This item, like all other questions of value, expense, etc., is properly based upon the estimate or opinion of witnesses familiar with the subject matter. As observed by this Court in *Ohio Utilities Co.* v. *Commission*, 267 U. S. 359, at page 362: "Reproduction value, however, is not a matter of outlay but of estimate . . ."

Cost of Cutting and Restoring Paving Over Mains and Service Lines

(Appellant's Brief, pages 14 and 34-38; Appellee's Brief, pages 13 and 34-37)

On page 13 counsel state that the propriety of excluding this item "is so clearly established that it is not now open to dispute," and cite the Des Moines case (238 U. S. 153),

Columbus Gas & Fuel Company v. *City of Columbus*, [illegible] F. (2d) 630, 633, and Whitten-Wilcox: Valuation of Public Service Corporations, at page 778. On page 777 of the text book cited the author says: "It is truly said that if the property had to be reproduced at the present time the cutting and replacing of the pavement in many instances would be a necessary part of the process." The Ohio statute requires that reproduction cost be used in making a valuation of a utility's property other than land, and makes that the measure of value.

At page 37 of appellee's brief it is said: "It should be remembered that there is no dispute over the dollar amounts as claimed by the appellant * * * covering this item but simply over the principle involved." Counsel contend that the ruling of this Court in *Des Moines Gas Co.* v. *Des Moines*, 238 U. S. 153, is decisive of the proposition. As pointed out in our main brief, the statute in effect in Iowa at the time the Des Moines case arose was different from that in force in Ohio. We do not regard the failure of this Court to reverse the master's finding in the Des Moines case as intended to lay down a universal principle of law, much less to adjudicate appellant's rights under the Ohio statute.

Going Concern Value

(Appellant's Brief, pages 14 and 38-49; Appellee's Brief, pages 13-14, 38-46)

At page 13 and again at page 38 counsel assert that where current prices as of a date certain are used in fixing the reproduction cost of property plus "[illegible] general overheads," and working capital is included, "going concern value has been given all the consideration it deserves and no *separate* allowance therefor is necessary." Here again the extravagant use of adjectives is in evidence, and a broad generalization is made without regard to the facts in this

case. Certainly, no one will contend that the allowance for general overheads made to appellant was "liberal" or generous; in fact, appellee's allowance for general overheads was substantially less than the lowest evidence and this is one of the errors assigned and relied upon in this case.

On page 43 of their brief counsel state: "The valuation formula prescribed by the Legislature of the State of Ohio does not permit an inclusion of a separate allowance for going concern value in the determination of fair value for rate making purposes." They cite Ohio G. C. 499-8, 499-9, 614-46, and the decision of the lower court in the Columbus case, 127 O. S. 109. These statutes not only permit but require an appraisal of a utility's going concern value and its allowance in the rate base; and the decision cited does not support appellee's contention.

On page 44 counsel say: "The law is well settled, both under the decisions of the Supreme Court of Ohio and of the Supreme Court of the United States, that where property of a utility is valued, not as junk or property lacking utility, but as a going plant in successful operation, the element of going value has been given all the consideration which it deserves, and no additional separate allowance for going concern value is permissible. * * * Indeed it is a matter of record that every valuation made by the appellee since 1917 which included a separate allowance for going concern value has been appealed to the Ohio Supreme Court and that the latter tribunal has without exception struck out every such allowance; and it is also a matter of record that no valuation made by appellee which omitted such an allowance has ever been declared invalid on appeal to the Ohio Supreme Court because of the absence of such an allowance."

We do not understand the decisions of either the appellee or the lower court to hold that an allowance for going

concern value may not be made because of statutory inhibition. As a matter of fact, the appellee made a separate allowance for going concern value as recently as 1931 in the Ohio Bell Telephone case, P. U. R. 1931 B, 46, 56-60; and the lower court has held it must be allowed (*Lima Telephone & Telegraph Co.* v. *Public Utilities Commission*, 98 O. S. 110, 124). If counsel's statement be correct it is obvious that the statute as thus construed would be unconstitutional, since a utility's going concern value is property which cannot be taken for a public use without compensation.

On page 45 counsel state: "The basic fallacy in the appellant's position is that it attempted to add a separate allowance for going concern value, not to evidence of fair value of property considered as junk, disconnected units or without business attached, without earnings or prospects of earnings, but to a fair value for a plant in full operation, with customers attached and earning money. It must be manifest to the most naive that if the plant of the appellant or any plant were valued as junk, or as property unassembled, or as property without customers attached, without established business, and without earnings, such a value would inevitably be only a fraction of the reproduction cost new less accrued depreciation as estimated in this and ordinary utility rate cases." It is clear, transparently so, that a statute which requires the ascertainment of reproduction cost new less depreciation of a utility's physical property other than land to be used as the basis of valuation does not contemplate "junk value."

The argument about "junk value" advanced by counsel for appellee as a reason why going concern value need not be allowed was definitely set at rest by this court in *Denver* v. *Denver Union Water Co.*, 246 U. S. 178. In that case it was claimed before the master that the company had no franchise or legal right to continue in business and its

property should therefore be valued at its "junk" or salvage value. The master disagreed with this contention and valued the property on the basis of reproduction cost new, less depreciation. He also made a separate and specific allowance for the company's going concern value. This Court held the company had the right to continue in business at least until the city took affirmative action to oust it, and said at pages 190-192:

"In this situation, there can be no question of the company's right to adequate compensation for the use of its property employed, and necessarily employed, in the public service; nor can it be doubted that the property must be valued as property in use. It involves a practical contradiction of terms to say that property useful and actually used in a public service is not to be estimated as having the value of property in use, but it is to be reckoned with on the basis of its 'junk value.'

* * * * * * * *

"What we have said established the propriety of estimating complainant's property on the basis of present market values as to land, and reproduction cost, less depreciation, as to structures. That this method was fairly applied by the special master hardly is disputed by appellants, except as they contest the items allowed for 'going concern value' and for the water rights acquired by complainant and its predecessors by original appropriation. With respect to the former item, we adhere to what was said in *Des Moines Gas Co.* v. *Des Moines*, 238 U. S. 253, 165: 'That there is an element of value in an assembled and established plant, doing business and earning money, over one not thus advanced, is self-evident. This element of value is a property right, and should be considered in determining the value of the property, upon which the owner has a right to make a fair return when the same is privately owned although dedicated to public use.'"

Although counsel argue this subject matter at considerable length and attempt to leave the impression that appellant's going concern value was provided for in the valuation, appellee disposed of it with the clear cut statement: "Going concern value will be disallowed" (R. 168.). It did not evade the issue or enter upon any such attempted defense of its action as counsel have in their brief.

Undistributed Construction Expenditures

(Appellant's Brief, pages 15 and 49-50; Appellee's Brief, pages 14-15, 47-49)

On page 14 counsel asserts "it was not error on the part of appellee and the court below to reduce the claim of appellant for this item from 17% to 14%" and again fall back upon their *omnium-gatherum* claim that the testimony was "purely speculative and conjectural"; and, although observing that reference to the result reached in other cases "under different circumstances is of litfle value in determining what is a proper allowance in this case," cite several prior decisions of appellee and the court below in which a uniform allowance of 7% for general overhead was made. They did not, however, cite appellee's decision in *Re Ohio Bell Telephone Company*, P. U. R. 1931 B, 46, 55, in which it allowed 17¼% for undistributed construction costs.

On page 49, counsel say: "It should be remembered that the allowance for this item is purely a judgment allowance, and we are of the opinion that the appellee was entirely justified in making an allowance of 14 per cent., and that such an allowance is more than ample." Counsel give no reason for this assertion or conclusion. We are willing to concede that the amount in any particular case is a judgment figure, but insist that the judgment must be that of a witness whose experience, training and special study of the

problem qualify him to make a proper estimate upon the matter. It is not the province of appellee to form its own conclusion on this subject matter without regard to the evidence. The question arises here only because of the fact that appellee and the court below arbitrarily fixed an amount for this item without reference to the record.

On page 49 counsel speak of the "unreliability of reproduction cost estimate of overhead." The laws of Ohio require the use of reproduction cost, and its consideration has also been required by this Court (*St. Louis and O'Fallon R. R.* v. *United States,* 279 U. S. 461). There would appear to be no more difficulty in estimating the cost of overheads than other construction costs.

Parenthetically it may be noted that the chief trouble with appellee's brief is that conclusions are drawn and authorities cited in support thereof based on mere assertions and assumptions without any reference to the facts of this case. While this practice occurs throughout the brief, we perhaps need only cite as illustrative the treatment of the item of undistributed construction expenditures.

Working Capital

(Appellant's Brief, pages 15-16, 51-52; Appellee's Brief, pages 15, 50-51)

On page 15 of their brief counsel say: "Upon the basis of the evidence in this case and in the light of all the circumstances, the amount allowed by appellee and affirmed by the court below was ample." As shown in our main brief the amount allowed was not based upon the evidence in this case and no circumstances were referred to or reasons given for disregarding it and arbitrarily fixing an amount substantially less than shown by the evidence to be necessary and proper.

At page 51 counsel say: "There is no dispute between appellant and appellee that some amount should be allowed for working capital. The only point of difference is the amount that should be allowed for this item." As the amount allowed by appellee is not based upon or supported by any evidence in the record, it is submitted that the real point of difference and question for consideration is whether the evidence is to be followed or wholly disregarded and an arbitrary amount fixed. Counsel concluded their discussion on page 51 with the customary refrain, that the evidence is "largely conjectural."

Annual Depreciation Allowance

(Appellant's Brief, pages 16, 54-55; Appellee's Brief, pages 16, 55-57)

At page 56 of appellee's brief it is said that the allowance of 2 per cent made by the appellee for annual depreciation is taken from the appellant's annual reports filed with the appellee. *These reports were not put in evidence, no reference was made to them by the appellee in its opinion or in its order denying appellant's petition for rehearing and its protest of valuation, and no reference was made to them in any way in the court below.* This is the first intimation appellant has had that these annual reports were used for any such purpose. If these reports were to be used for that purpose, appellant was entitled to notice of that fact at some time before final decision. The record contains nothing to show that this figure, 2 per cent, was taken from appellant's annual reports and the statement of counsel for appellee cannot supply evidence.

In *West Ohio Gas Co.* v. *Public Utilities Commission of Ohio*, 42 F. (2d) 899, 900, the Statutory Court said:

> "The Commission, examining its own records, found that the rate of 55 cents per thousand cubic feet, con-

tracted by plaintiff to be paid for natural gas at wholesale, was unreasonable and excessive in comparison with wholesale rates obtained by other gas companies in various cities and villages of Ohio by contract with wholesale distributors of natural gas. * * * The use by the commission of its files of schedules of other companies within the state as evidence supporting its present action was not brought about in the formal way by the introduction of the same in evidence at the time of the hearing of protests, but simply by taking notice thereof as a matter of public record, with no opportunity to the plaintiff either to be heard respecting them, or to introduce testimony respecting their nonapplicability to the situation confronting the plaintiff in securing gas for its service in the village. The schedules so referred to by the commission are not brought into this record, nor could they under the circumstances of the hearing, be brought to our attention; for it is established that the commission might not base its conclusions upon its files and other general information, unless the same were put in evidence in the particular proceeding, and opportunity given to the plaintiff to meet and explain them. The question is fully considered by a three judge court in this circuit, in *Illinois Central Railroad Co.* v. *Railroad Commission of Kentucky et al.*, 1 F. (2d) 805, 806, citing decisions of the Supreme Court of the United States on that subject, and we are constrained to follow its conclusions."

In the recent case of *Re City of Yuma*, 2 P. U. R. (N. S.) 8, an allowance of 4 per cent of the Arizona Edison Company's depreciable gas property was made for annual depreciation.

Reasonableness of Contract Price of Gas Purchased

(Appellant's Brief, pages 16-18, 55-61; Appellee's Brief, pages 17, 58-62)

The appellee in its brief lays great stress on the decisions in *Smith* v. *Illinois Bell Telephone Company*, 282 U. S. 133, *Western Distributing Company* v. *Public Service Commission of Kansas*, 285 U. S. 119, and *State Corporation Commission* v. *Wichita Gas Company*, 290 U. S. —, and treats them as being conclusive of the question here under consideration.

We do not think this Court held, or meant to hold, in those cases, or any of them, that a relatively small natural gas utility, having a property valuation of only about $1,200,000, which happens to be affiliated with large producing companies and purchases gas from one of them, must try a rate case which would necessarily cost several hundred thousand dollars in order to justify the contract price in every instance in which some little town or towns with a relatively small number of consumers, sees fit to complain against its rates. If that is the only way that the contract price can be shown to be fair and reasonable, it imposes a burden on small utilities they cannot bear. There is, we submit, no justification for such an interpretation of this Court's decisions. There must be, and are, ways for such a utility to justify the price it pays for gas without incurring expense which, if included in the company's operating expenses, would increase the rates to consumers more than would be saved by a reduction in the contract price, and if not included in the company's operating expenses would deprive its stockholders of all the return to which they are entitled for rendering the service.

Appellee claims to have allowed the appellant a return amounting to $56,445 a year. It would take all of this re-

turn for several years at least to pay the expense of a rate case involving the valuation of the property of the Ohio Fuel Gas Company, in the State of Ohio, amounting, according to the appellee's own inadequate valuation to $74,000,000, and also the property of the United Fuel Gas Company, in West Virginia and Kentucky, amounting, according to the appellee's inadequate valuation, to $37,000,000, together with the business and operations of these companies in the public service and outside it.

Valuation of No. 1 Leaseholds.

(Appellant's Brief, pages 18-19, 79-108; Appellee's Brief, pages 18-20, 66-124)

A Significant Admission

The appellee's brief on this question adopts the argument of the city of Columbus in the Columbus case and quotes almost all of it verbatim, at pages 66-124. However, it is significant that on page 106 there is an omission indicated by stars. The omission consists in parts of pages 164-165 of the city's brief in the Columbus case. The last paragraph omitted reads as follows:

> "The $25.00 per acre fixed as the value of the Logan property, as of December 31, 1924, was practically an arbitrary valuation, although a little color for the use of the figure was found in the record from the testimony of certain witnesses that is was the amount used per acre for certain of the leaseholds in question by certain of these companies dealing between themselves. There is nothing of that nature in the record in this case."

The foregoing is a very significant statement. It admits that the value of $25.00 per acre fixed in the Logan case was arbitrary. The Logan case above mentioned is the latter of the two Logan cases cited and quoted from so often in

appellee's brief and is reported in 124 O. S. 248. The special counsel for the city of Columbus in *Columbus Gas & Fuel Company* v. *Public Utilities Commission* now pending before this Court who wrote the above paragraph, was a member of the Public Utilities Commission of Ohio at the time of the decision by the appellee of the Logan case therein mentioned. Undoubtedly he knows what he is talking about when he says that "the $25.00 per acre fixed as the value of the Logan property * * * was practically an arbitrary valuation."

The valuation of leaseholds in the above-mentioned Logan case, although admittedly arbitrary, was no more so than the determination by appellee and the court below of the amount of leaseholds used and useful in the earlier Logan Gas Company case (121 O. S. 507), which determination is cited and followed by the appellee and lower court in this case. We respectfully submit that the above quoted admission deprives the Logan cases of any weight whatever as precedents.

Values of Leaseholds Proved Are Not "Astounding" or "Imaginary"

At page 77 of appellee's brief, the values of leaseholds proved by the company are referred to as "astounding values"; and at page 79 they are called "imaginary values." If the values proved were "astounding" or "imaginary," why did not the city or appellee prove that fact? Clearly, if the values proved in a case of such prominence were "astounding" or "imaginary," it would not be difficult to find competent witnesses who were able and willing to testify to that fact. The city made no attempt to introduce such testimony. Having failed to present testimony on the subject they cannot supply it by the use of rhetorical language.

United Fuel Gas Company v. *Public Service Commission of West Virginia*, 14 *F.* (2*d*) 209, *Distinguished.*

At pages 86-87 of appellee's brief, the above mentioned case is cited and quoted from at length as an authority for valuing only the operated leaseholds. In that case, the court below allowed, and this Court affirmed, a valuation of $10,317,311.39 for the "gas reserve presently used and useful in the public service ('proven' territory)." There were 136,384 acres of "proven territory" included in that valuation (287 *U. S.* 322, *at* 325). *This means the court below allowed, and this Court affirmed, a valuation of* $75.65 *an acre for the operated leases of the company, whereas, in this case the "book value" of No.* 1 *leaseholds which the lower court holds must be used in lieu of the present value thereof amounts to* $5.38 *per acre* (see our principal brief, page 104). Moreover, in that case the delay rentals, or carrying charges, on all the unoperated leases were allowed as a part of the company's operating expenses; in the instant case, all such delay rentals are excluded from the operating expenses. In reviewing the decision of the Statutory Court in the above cited case, this Court said:

> "The court below made no finding as to the value of appellant's gas rights. It included in the rate base the 136,384 acres of land described by appellant's witnesses as proven territory, that is, areas which had been thoroughly tested and are now producing gas, and excluded 126,208 acres of land described as probable territory, that is, territory which had been partially tested or which appeared on the basis of geological evidence and its geographical relation to productive areas to be a probable source of natural gas. It was by this division of appellant's gas field and the inclusion of but a part in the rate base, at the full value claimed by appellant, that the court below reached its assumed valuation of the gas field of $10,317,311. The rest of the territory, consisting of 552,319 acres classified as

improbable or unfavorable territory, [illegible] *by the court below and appellant's own [illegible] mating available gas supply.*" (278 U. S. [illegible])

Immediately following the matter quoted from his opinion, Judge Rose said:

> "If we are right, $10,317,311.39 is the highest valuation which can be put upon such portion of plaintiff's reserves as it has any claim to include in its rate base." (14 F. (2d) 222, first column)

Again, at page 217, referring to an opinion of the West Virginia Commission, Judge Rose said:

> "As the plaintiff's evidence relating to the increase in value dealt solely with 'gas reserves' and 'gas acreage,' it was in his view beside the mark. *No testimony had been offered as to the worth of the leaseholds as such* and subject to their varying terms, conditions, and limitations." (14 F. (2d) 217)

The book value of *all* the company's gas rights and leaseholds was $6,343,329.67 (278 U. S. page 324).

As the question here involved is primarily one of confiscation of property, the substance of the decision, and not merely the theory or the terminology, is the vital thing. It will be observed that the court allowed for the [illegible] acres of operated leaseholds 62 per cent more than the book value of all the leaseholds amounting to [illegible] acres.

Appellee's Theory That Public Service Is an Encumbrance Which Lessens Value of Leaseholds

At page 95 of appellee's brief, it is said:

> "There exists a very important encumbrance upon these leaseholds arising out of the public utility obligation resting upon them, but the witnesses in placing a so-called market value upon them, gave it no consideration."

That the theory is unsound is clear under the decisions of this Court. The *Minnesota Rate Cases* (*230 U. S. 352*) definitely settled the rule that the general market value of real estate is the value at which it must go into the rate base, and that nothing can be added to that value because of the use of the property in the public service, and this rule has not been questioned since that decision. Inasmuch as nothing can be added to the value of such property because of its use in the public service, it necessarily follows as a matter of simple justice that nothing can be subtracted from that value because of the use of the property in the public service. This view is entirely consistent, and is the only view that is consistent, with the decisions of this Court as to what constitutes compensation for use of a utility's property in the public service—that is, that it is entitled to earn a reasonable return upon the present fair value of that property, in order to prevent confiscation, and that in all such cases involving compensation for property under the constitution, the general market value of the property is the final test of compensation. Nowhere in the decisions of this Court is there any justification for the theory that a deduction can be made from the value of the property of a public utility because it is used in the public service, in fixing the amount of return to which the utility is entitled.

If the appellee's theory were the law, it would be impossible to value property of a public utility, because it would be impossible for any witness to say how much should be deducted from its value because of its use in the public service, and the matter would necessarily be left to the arbitrary determination of the commission. It would furnish a means of evading the decisions of this Court which sustain the right of a utility to earn a reasonable return upon the present fair value of its property used and useful in the public service.

That the appellee actually believes that it has the right to so fix values seems clear from the fact that in its opinion in the Columbus case (R. 150, fol. 223), it said:

> "* * * the value of the land in the market would depend upon the price which the regulated company *may be permitted (sic!)* to charge to its customers." (Italics supplied.)

Further illustrations of the same thought appear at different places in the record, one good illustration being at R. 1284 (Columbus Record), where one of the commissioners said to the witness Webber:

> "Q. * * * you estimate the value of the acreage by having some general knowledge of how much you could sell that gas for; *we have got to say how much you sell that gas for and turn around and find out how much his property is worth producing gas.*"

The doctrine here under the consideration is not a minor matter. It goes to the very vitals of utility rate making. If it is correct, all the decisions of this Court which prescribe the limits below which utility rates cannot go without confiscation would be ineffective.

Appellee Contends Market Value of Leaseholds, if Established, Could not Be Adopted "for Rate Purposes"

Again, substantially the same thought reappears at pages 99-100 of appellee's brief, where it is said:

> "We submit that there is no market and that the bases assumed by these company witnesses were wholly speculative and uncertain, *but that, even though there were a market, the value of the lands for rate purposes could not be established by what they would bring in exchange.*"

Here we have a clear-cut issue—*a bald statement of the appellee's position that the market value of the leaseholds, even when established by the evidence, cannot be accepted and included in the rate base.* This is the old, exploded doctrine that the term "*value*", in a rate case, means something different from what it means in other cases involving compensation for property. No decision of this Court justifies that distinction. If commissions and state courts could attach to the term "value" a meaning of their own differing from that given to it by this Court they could evade the decisions of this Court which guarantee to utilities a return upon the present fair value of their property used and useful in the public service as a minimum below which state made rates cannot go without confiscation. (No question of the value of service is involved in this case) In *Erie* v. *Public Service Commission* (*Pennsylvania Gas Company* v. *Public Service Commission*), 278 Pa. St. 512, the Supreme Court of Pennsylvania reversed the Public Service Commission and Superior Court of that state for rejecting the general market value of gas producing lands which was established by testimony similar to that in the instant case. In delivering the opinion of the Court, Mr. Justice Kephart accurately stated the applicable law on the point as follows:

> "While the busines of supplying gas is national in character, affected with great public interest, and the commodity a product of nature, such circumstances do not differentiate these holdings from any other class of property in private ownership. There should not be one rule for valuing property generally for rate making, another for gas lands used in public service, another for condemnation, another for taxation, and still another for private sale or exchange. If the property which legally enters into the consideration of the question of rates has increased in value since it was

acquired, the company is entitled to the benefit of such increase: *Willcox* v. *Consolidated Gas Co., supra,* 52; *Georgia Ry. Co.* v. *R. R.Comm., supra,* 631; *Bluefield Co.* v. *P. S. C. of West Virgina, supra,* 690." (Pages 524-525)

* * * * * * *

"The standard to be applied in fixing present value of lands would be 'present market value'; *Denver* v. *Denver Union Water Co., supra,* 191; *Willcox* v. *Consolidated Gas Co., supra.* In so considering it (Minnesota Rate Cases, *supra,* a greater value cannot attach because used in public service. The rule is limited to general market value outside the public service, or in a market not considering such service. While this may call for careful scrutiny of the evidence, such considerations afford no excuse for refusing to give the value required by law. The rule was applied in valuing Neville Island: *Ben Avon Boro.* v. *Ohio Valley Water Co.,* 271 Pa. 346. The test, under the Fourteenth Amendment, in rate cases, is whether the utility is deprived of its property or a part of its value in the return allowed. The rule of just compensation, as in condemnation cases, should be applied to gas lands (*Smyth* v. *Ames, supra,* 546; *Reagan* v. *Farmers' Loan & Trust Co.,* 154 U. S. 362, 410; *Minnesota Rate Cases, supra; Mercerburg, etc., Electric Co.* v. *P. S. C.,* 76 Pa. Superior Ct. 58, 65), though generally the rate base may include elements not properly cognizable in condemnation cases. Property is protected by protecting its value, which, in this class, is what it is worth in a fair market. In fixing market value for a present value, we bring the holdings under the constitutional protection governing condemnation for public or quasi public uses." (Pages 525-526)

* * * * * * *

"The company produced witnesses who testified the market value of the sixteen selected warrants was from $7,212,000 to $10,000,000, and the Ludlow field $4,-

000,000. It appears these gas fields were developed, defined and have been in actual operation producing gas from a known sand for a great many years, sufficient to show the quality. It is no longer doubtful among those familiar with the business, whether expert geologists or engineers or practical gas-producing men, that the remaining life of the fields can be determined with reasonable accuracy—with as much accuracy as is used in dealing with ordinary affairs of life. While this may be said to be a matter of conjecture, because not seen, as is a seam of coal, and it may suddenly end, the frequency of this in a defined territory is remarkably small. It is on such examinations large sums of money are invested. Most of the witnesses base their estimates on their knowledge of the field in general. The location of the lands was shown, location of the wells, the date each well was drilled, its depth, the character of sand in which gas was found, its thickness, the initial open flow volume of gas, the initial present rock pressure, the line pressure, the volume of gas delivered January, 1920, by each well into the line against the line pressure, together with the details of measurement on which the computation of the present volume is based. . . . The commission, in valuing the gas holdings, stated, 'Taking into consideration the total gas holdings of the respondent, with all the testimony bearing on their present value, we are of the opinion that the used and useful portions attributable to Pennsylvania should be included in the rate base at $5,500,000.' The lowest value under the evidence was $11,212,000; it is apparent, from what the commission said, they proceeded on an erroneous conception of the evidence. Much, if not all, of the testimony would have been admitted as evidence of market value in condemnation of the same land. No attack was made on the competency, sufficiency or credibility of the witnesses to establish the fact of general market value." (Page 526-527)

Blundon's Figures of Alleged Cost of No. 1 Leaseholds

At pages 104-105 of appellee's brief, the statement is made that City Exhibit 115 in the Columbus case shows that the average price paid by the Ohio company for leaseholds of Class No. 1, in 1927, 1928 and 1929 was from 62¢ to $2.05 an acre. The testimony of the witness referred to and the exhibit mentioned are very misleading. Except a few renewals, the leaseholds referred to by the witness as "No. 1" and for which he says the Ohio company paid an average price in 1927, 1928 and 1929 of $2.05 per acre, were not No. 1 leaseholds at the time they were acquired—that is, there were no producing gas wells on them at that time. They were merely leases of land which were undeveloped at the time they were obtained, but which proved to be good gas producing territory when they were subsequently drilled. For instance, the first lease listed in said City Exhibit No. 115 (R. 3187) is the M. Wittemire lease, file No. 84,073, in Green Township, Ashland County, containing 30 acres. A reference to Company Exhibit No. 145, page 5, shows that this lease was acquired March 28, 1927, and that the well thereon was drilled May 17, 1929, more than two years later. Of course, at the time this lease was acquired on March 28, 1927, it was not an operated, or Class No. 1 lease. There is no justification for saying that the prices paid for such leases were prices paid for Class No. 1, or operated, leaseholds, and for the witness and the appellee's counsel to so treat them is very inaccurate, to say the least.

Moreover, an examination of page 2 of Company Exhibit No. 142 shows a map of Green Township, Ashland County. In section 20, which is a little west and slightly south of the center of the township, appears this lease No. 84,073, containing 30 acres, but it appears in the name of Tobias Wittemire; that it is the same lease is established by the

number. At the time that lease was acquired by the Ohio company the John K. Cowen lease, which is east, northeast and southeast of it, had not been drilled. This appears by the same page of Company Exhibit No. 145, which shows the date of the drilling of the two wells on the Cowen lease to be subsequent to the acquisition of the Wittemire lease. In other words, there was no producing gas well close to the Wittemire lease at the time it was acquired, and, of course, the consideration paid was for an undeveloped lease; that it happened, subsequently, to prove to be good gas producing territory does not affect the fact that it was an undeveloped lease when acquired. The well drilled on this Wittemire lease produced, when drilled in, 1,292,000 cubic feet of gas a day and had an initial rock pressure of 1180 pounds (Company Exhibit 145, page 5). It is absurd to say that a land owner, if it had been proved that the land would produce wells of that size, would lease it at $2.05 an acre, or $61.50 for the lease. This is a sample of the unfairness of calling these leases No. 1 leases, contrary to the plain fact.

Amortization

(Appellant's Brief, pages 20, 109-117; Appellee's Brief, pages 109-124)

At page 118 of appellee's brief, the testimony of Professor Dewing is quoted to the effect that because of "the possibility of the use of producer gas in connection with natural gas, and the ultimate substitution of producer gas for natural gas, if necessary," he did not agree that "it would be the part of good business to put aside a reserve of four per cent each year to get the capital back at the end of 25 years," etc. Disregarding the fact that the witness had not been introduced or examined by the company on

any such subject, the following considerations regarding the testimony quoted should be noted:

1. The assumption that producer gas will be used instead of natural gas is purely speculative. If the company had introduced and relied on testimony so hypothetical and uncertain, no credence would be given to it. The same rule should be applied in its favor that would be applied against it.

2. The court below did not base its holding that the laws of Ohio make no provision for amortization on any *evidence* in the case, but on its *interpretation of the statutes.*

3. The testimony quoted takes no notice whatever of the undeniable depletion of leaseholds and the consumption of the properties known as gas well construction and gas well equipment in the public service or of the further fact that all field lines, large transmission lines, compressor stations, etc., would become useless with the exhaustion of natural gas. We do not note anywhere in appellee's brief a denial that, as a fact, these particular properties are used up in the public service.

The court below did not accept this testimony, or any other testimony in the case to the effect, as alleged by appellee, that there was no probability of exhaustion of the gas supply; but, to the contrary, the court said: "That the product natural gas will eventually die is self evident." (R. 74)

The general corporation laws of Ohio, recognize depletion. *Ohio General Code, section* 8623-38, contains the following:

> "(a) A corporation may declare dividends payable in cash, shares, or other property out of the excess of the aggregate of its assets less the deductions hereinafter required over the aggregate of its liabilities plus stated capital.

(b) In computing the excess of the assets, deductions shall be made for *depletion*, depreciation, losses, and bad debts." (Italics supplied)

Rate of Return

Counsel for appellee open their argument on this subject with the statement (p. 21): "The contention of the appellant that it is entitled to a minimum rate of return of 8% for the period from July 17, 1921 down to the present time is entirely unwarranted." If the rates to which appellant was remitted by appellee were confiscatory on the date certain, its order in this case and the judgment of the lower court must be set aside.

On page 22 counsel remark that "the contention of the appellant that it is entitled to an unusually high rate of return on the basis of the hazardous nature of the gas business is based upon a theory which has long since been exploded." From its further reference to this "theory" on page 133 it is presumed that counsel for appellee referred to the danger of exhaustion of the supply of natural gas for the towns in question. No reference is made to any testimony or evidence on this subject matter. The fact that a mining venture like the production of natural gas is fraught with much greater hazard than most other utility service is known to all who are familiar with the matter.

On page 133 counsel say: "It should be further borne in mind that appellant is not entirely a gas company." While it is true appellant furnishes electric current to a number of communities, it does not furnish this service to all of the towns involved in this proceeding. Only appellant's natural gas business is involved in this case.

Counsel for appellant make reference to the business depression (pages 129-130) at the time "this matter (was) before the appellee (1930-1932)" and assert that appellant's argument would have appellee ignore its "actual ex-

perience'' under the increased rates since July 17, 1929. As already noted appellee blows hot on rate of return and cold on taxes. If appellant's revenues (''actual experience'') be considered for these depression years rather than for the years 1928 and 1929 contained in the record (R. 581) the appellee could not have found it ''to have been slightly in excess of 6½%'' (Appellee's Brief, p. 129).

If judicial notice is to be taken of the effect of the business depression on appellant, the fact that its cost of rendering gas service is a more or less *fixed* amount (regardless of temporary business conditions), that the depreciation of its property continues just the same, and that its taxes have been substantially increased since the business depression set in, should be considered.

The following allowances for return have been made in recent natural gas cases (during the period referred to by counsel for appellee):

	Per cent
Bowdoin Utilities Co. (Mont.), P. U. R. 1931 B, 20 (8% additional allowed for depreciation and amortization)	8
Oklahoma Natural Gas Corp. (Okla.), P. U. R. 1931 B, 470 (5% for depreciation and amortization)	8
Rushville Natural Gas Co., (Ind.), P. U. R. 1931 D, 92 (6¾% for depreciation and amortization)	7
Western Ohio Public Service Co. (Ohio), P. U. R. 1931 D, 1	7

Conclusion

Attention is again invited to the fact that the questions presented in this case have to do with the application of fundamental legal principles to established facts. Items of property value and operating expense proved by uncon-

tradicted and credible testimony were disallowed in whole or in part. The disposition of these issues so vital to the natural gas industry will determine its ability to continue rendering a useful public service in the State of Ohio. The decision of the court below being without evidential support and contrary to the law of the land should be reversed.

Respectfully submitted,

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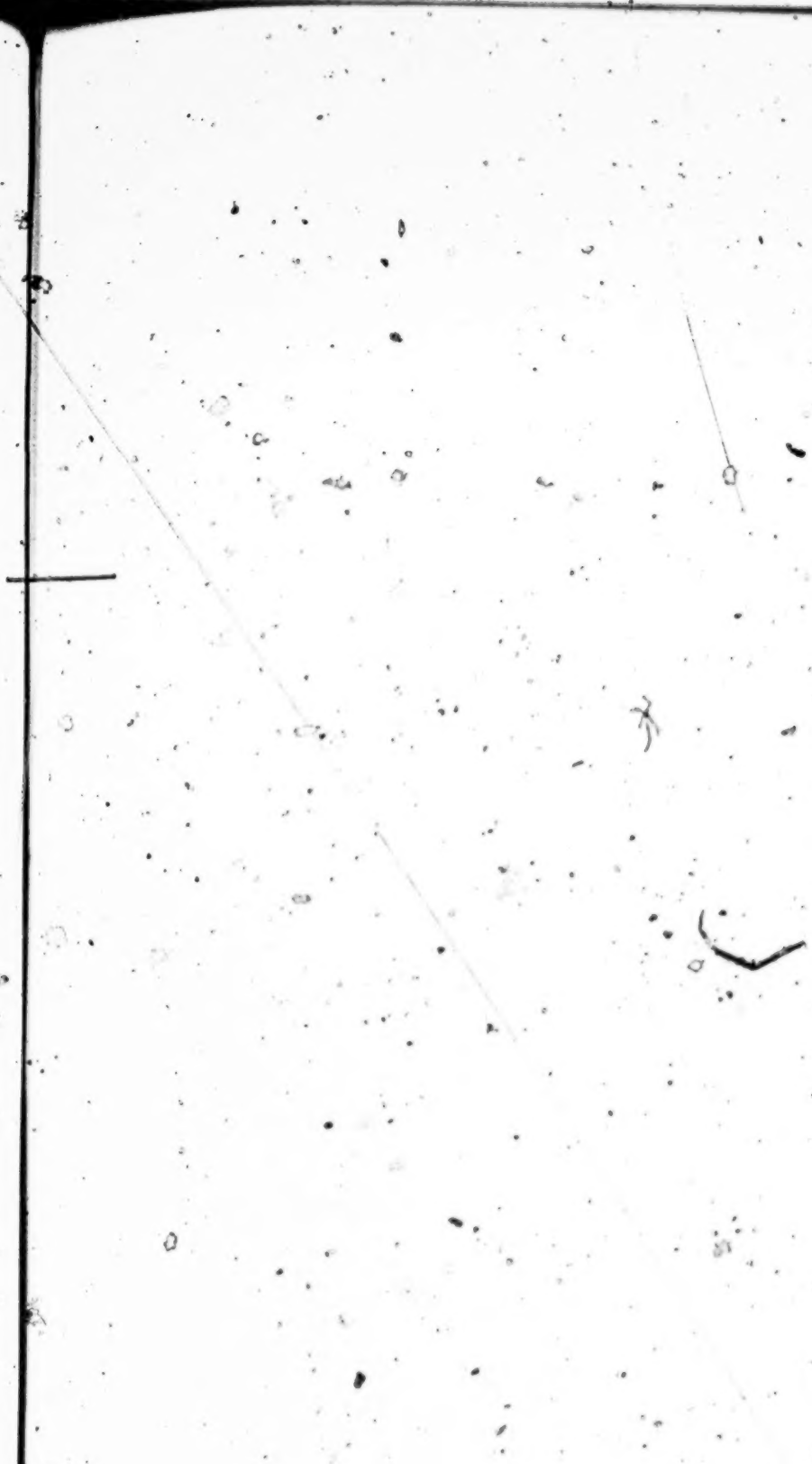
EDWIN P. MATTHEWS,
CHARLES P. PFARRER,
CHESTER J. GERKIN,
Counsel for Appellant.

Dayton, Ohio, March 12, 1934.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 609

THE DAYTON POWER & LIGHT COMPANY,
Appellant,

v.

THE PUBLIC UTILITIES COMMISSION OF OHIO,
Appellee.

MEMORANDUM OF APPELLANT IN RESPONSE TO COURT'S REQUEST.

JOHN E. MULLIN,
EDWIN P. MATTHEWS,
CHARLES P. PFAHLER,
CHESTER J. GERKIN,
Counsel for Appellant.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 609

THE DAYTON POWER & LIGHT COMPANY,
Appellant,

v.

THE PUBLIC UTILITIES COMMISSION OF OHIO,
Appellee.

MEMORANDUM OF APPELLANT IN RESPONSE TO COURT'S REQUEST

At the oral argument of this case yesterday members of the Court propounded to counsel for appellant and appellee certain interrogatories and requested them to file memoranda thereon.

Interrogatory No. 1. Show by the record what companies mentioned in Exhibit No. 13 (R. 590) are not affiliated with appellant or connected in any way with Columbia Gas & Electric Corporation?

Answer.

Hope Natural Gas Company,
United Natural Gas Company.

All other selling companies are affiliated with appellant.

Interrogatory No. 2. What is the difference between the cost and "book value" of the Ohio Fuel Gas Company's leaseholds?

Answer. The record does not disclose the cost of leaseholds. See the testimony of L. A. Seyffert at R. 1045 (Case No. 608). The "book value" as of December 31, 1929, of all the company's leaseholds was $8,418,280.83, city exhibit 27, R. 3020 (Case No. 608). The "book value" of the separate classes of leaseholds does not appear. The City introduced Exhibit 86, R. 3164-5, which sets forth a so-called reproduction cost of No. 1 leaseholds amounting to $1,569,479. This exhibit is explained at R. 1418 and 1440. (At page 104 of appellant's main brief this figure of $1,569,479 is inadvertently referred to as showing the "book value of No. 1 leases.")

Interrogatory No. 3. Does it appear in the record how book costs of leaseholds were made up?

Answer: No, although the testimony of Mr. Seyffert at R. 1045-1046 (Case No. 608) has some bearing on this question.

Interrogatory No. 4. How did appellee determine a system-wide gate rate for the Ohio Fuel Gas Company?

Answer. It valued all of the company's property used in the production and transmission of gas, determined its operating expenses in connection with that service and allocated or apportioned the cost on a sales or M.c.f. basis, R. 138 (Case No. 609).

Interrogatory No. 5. How did appellee arrive at a valuation of $25.00 per acre for No. 1 leaseholds in this case?

Answer. Appellee adopted the amount fixed by it (and approved by the court below) in the Logan case (R. 151).

This finding of appellee was set aside by the court below (R. 70).

Interrogatory No. 6. Does the record disclose earning statements and the capital structure of the Ohio Fuel Gas Company, and of appellant?

Answer. Company Exhibit No. 43 (R. 2899-2907, Case No. 608) sets forth the income of the Ohio Fuel Gas Company for the years 1927, 1928 and 1929 and the balance sheet as of December 31, 1929; also the capital structure and earnings of the entire Columbus group of companies controlled by Columbia Gas & Electric Corporation. City Exhibits No. 46 and 47, R. 3032-3034 (Case No. 608) contain the income statement and balance sheet of the Ohio Fuel Gas Company for the year ending December 31, 1930. Testimony on these subjects is found at R. 888 *et Seq.* (Case No. 608. Company Exhibit No. 8, R. 581 (Case No. 609) contains the income and operating expense of appellant under the former and present schedule of rates. Appellee's determination of appellant's income and operating expenses appears at R. 223. The record does not disclose the capital structure of appellant.

Interrogatory No. 7. Is there a reserve of gas in Class No. 1 leaseholds?

Answer. No. Mr. Seyffert's answer, R. 1052-1054 (Case No. 608) follows:

"If we were confined to the use of Number 1 acreage only, we would very shortly run ourselves into very greatly mounting costs on the one hand or else a decided shortage of gas on the other, and it is the latter that would be more likely to occur, because if we were limited to Number 1 acreage, which, as I recall, is some 291,000 acres, and estimates have been made of reserves under that of say approximately 300 billion cubic feet; at the rate that we are

now producing, assuming that we could buy gas from independents and West Virginia in the same amount that we are buying, the amount of gas in the ground would only be equivalent to about a ten year period and if we were not able to buy this gas from other sources, the amount of gas in the ground would only be equivalent to five or six years' supply if we could get it out of the ground in that time, which would be impossible. If the West Virginia Company were further restricted to only the use of their Number 1 acreage, we would very certainly be compelled to get along without that gas for Ohio, because they could not in turn produce the amounts.

Now, I would like to go a little further there to explain the situation. You have a reservoir with an estimate of a certain amount of gas in it. We have had on that reservoir at the time, December 31, 1929, approximately 3,600 wells. Taking that, together with the dry holes that have been drilled, and the abandoned wells also on Number 1, would indicate that there has been a well drilled to somewhere around from 65 to 75 acres. Now, the company, if they wanted to take the gas out of that area in a proper and economical way, would perhaps not drill any more wells at all on it except those wells that are necessary by reason of lease requirements or offsets by others, that is, wells that we would have to offset others in order to protect our interests and protect the interests of our own leases (sic lessors). Now, if an attempt were made to take gas out of that area in a shorter period, it would mean immediate depletion of the rock pressure, the rock pressure would immediately go down and each well would produce a correspondingly smaller amount of gas or it would take a longer time to get the gas out. Ultimately, the full recovery could be gotten, but it would take a longer period of time.

Now, if that area were drilled without regard to the cost, we would have to put down two or three times as many wells which would reduce the rock pressure. Gas would then flow very much more slowly in the opening made by the well, which in turn could not get out of the well unless the line pressure were reduced, which would mean additional pumping equipment to reduce the line pressure in order to take the gas out of the ground and get it to the market, because, assuming again the market demands being as they are today, we would still need the discharge pressure at the compressor stations that we now need, but the difference between the discharge pressure and the intake pressures would be a great deal different, necessitating therefore a great deal more power to bring that gas from a low pressure, which would be necessary to take it out of the ground, and the higher pressure necessary for the transmission of it to the markets. The result would be that recovering the quantity of gas that is in that area, the price would just mount, two, three, four times, just up to a prohibitive figure, it just wouldn't be done.

The best answer I have to this whole thing is that the property was developed then, is developed now to the best judgment of the men who have been in the business all their lives, and the wells that were then on the property is what should be there in the judgment of the management.

Q. Would the Number 1 acreage of the Ohio Fuel Gas Company be sufficient during the life of this ordinance under question here, that is, from November 1st or 12th, 1929, for five years forward?

A. It would not, except at a very prohibitive cost. Understand, there are enough cubic feet of gas in the ground, but it can not be gotten out in that period, at any cost that is within any reason."

See also appellant's main brief at page 68, et seq., with citations from the record showing that not only is there no reserve in No. 1 leaseholds but that the leaseholds known as No. 2 and a part of No. 3 are being drained by the wells now supplying gas.

Appellee found that class No. 1 leaseholds would be exhausted in three years and two months. It said: "As to amortization we have considered the evidence disclosing that the average life of an Ohio well is seven and one-half years. The depreciation estimated from present rock pressure of each well discloses that there is at this time a depreciation of 58.1126%, leaving the present value of these items of 41.8874% of the original value of the leaseholds.

Considering the present condition of these wells the remaining life expectancy is an average of three years and two months. We have considered that accounts 211, gas well construction, and 212, gas well equipment and leaseholds, are all subject to the proper amortization for the reasons already set forth. Considering the present value of the three items in reference to the remaining life expectancy, we find that the annual amortization should be $4,158,954." (R. 158, Case No. 609.)

This is referred to at page 83 of appellee's brief as "the reversed finding of the majority commission that Class 1 acreage would be exhausted three years and two months after December 31, 1929."

The appellee and court below did not rely on any possible calculation of reserves in No. 1 leaseholds such as mentioned by counsel for the appellee in the oral argument and concerning which this court requested information. Appellee said:

"It is impossible to estimate the gas content of any acreage or the life of its productivity" (R. 151). At R. 76 the court said: "If amortization is to be allowed this company,

it should be based on the probable life of the business and not on the probable life of its producing [illegible] conceded that the life of the company will be [illegible] twenty five years. Hence, if amortization was [illegible] under the laws of Ohio, it should be spread [illegible] five years."

The record clearly shows that the court [illegible] make or approve any such compilation [illegible] suggested by counsel for appellee. [illegible] court below expressly stated it would [illegible] upon the evidence that, with all of the [illegible] serves and ability to purchase gas, the [illegible] the business would be approximately 25 [illegible]

Interrogatory No. 8. "What difference [illegible] in cents per M.c.f. does the failure [illegible] holds have on the gate price of gas?"

Answer. The difference is [illegible] as follows: The lowest value of the [illegible] acreage testified to by any witness [illegible] 2910-2911, Case No. 608); an [illegible] the gate price; the delay rentals [illegible] its reserve acreage in the year 1929 amounted [illegible] (R. 2908, Case No. 608), which divided [illegible] m.c.f. of sales requires an additional [illegible] amortization at the rate of [illegible] No. 608) adds to the gate [illegible] a total of 6.7503c per M.c.f.

The following are pertinent [illegible] the Court during oral argument:

The Ohio Constitution, Article IV, [illegible] Supreme Court of Ohio "such [illegible] proceedings of administrative officers [illegible] by law." Section 544 of the General Code [illegible] follows:

> "A final order made by the Commission shall be reversed, vacated or modified by the Supreme Court, on a petition in error, if upon consideration of the record such court is of the opinion that such order was unlawful and unreasonable."

In *Logan Gas Company v. Public Utilities Commission of Ohio*, 115 O. S., 107, 111, the court said:

> "The single question presented in this case is whether the Logan Gas Company has the right to file a second schedule, Schedule No. 8, establishing further increased rates during the pendency of the hearing as to the reasonableness of the rates shown by Schedule No. 7," and held that a utility does not have that right.

In appellant's reply brief at page 16 an extract is quoted from the brief of the City in the case of the *Columbus Gas and Fuel Company* v. *Public Utilities Commission of Ohio*, and the following statement is made:

> "The special counsel for the City of Columbus in *Columbus Gas & Fuel Company* v. *Public Utilities Commission*, now pending before this Court, who wrote the above paragraph, was a member of the Public Utilities Commission of Ohio at the time of the decision by the appellee of the Logan case therein mentioned. Undoubtedy he knows what he is talking about when he says that 'the $25.00 per acre fixed as the value of the Logan property * * * was practically an arbitrary valuation.'"

Our attention has been called to the fact that the special counsel for the City of Columbus above mentioned ceased to be a member of the Public Utilities Commission of Ohio several months before the decision of the Logan case above referred to. We regret our error and, of course, hasten to correct it.

Statement Showing Confiscation

Value of appellant's property (R. 593)		$1,250,221
Operating expenses allowed by appellee (R. 223)		$678,778
Add to correct appellee's allowance for		
Purchase of gas (R. 581) 1,192,471 m. c. f. *@* 45c	$537,081	
Amount allowed *@* 39c (R. 223)	465,534	71,547
Annual depreciation required (R. 581)	$43,981	
Annual depreciation allowed (R. 223)	13,721	30,260
Return of 8% on $1,250,221	$100,017	
Allowed by appellee, 6¼% on $868,387 (R. 223)	56,445	43,572
Total expenses and return		$823,157
Revenue under rates fixed by appellee (R. 223)		679,444
Deficit		$144,713

Respectfully submitted,

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EDWIN P. MATTHEWS,
CHARLES P. FARRER,
CHESTER J. GERKIN,
Counsel for Appellant.

Washington, D. C.,
March 15, 1934.

(4735 C)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 609.

THE DAYTON POWER AND LIGHT COMPANY,
Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO,
Appellee.

BRIEF ON BEHALF OF APPELLEE.

JOHN W. BRICKER,
Attorney General of Ohio,
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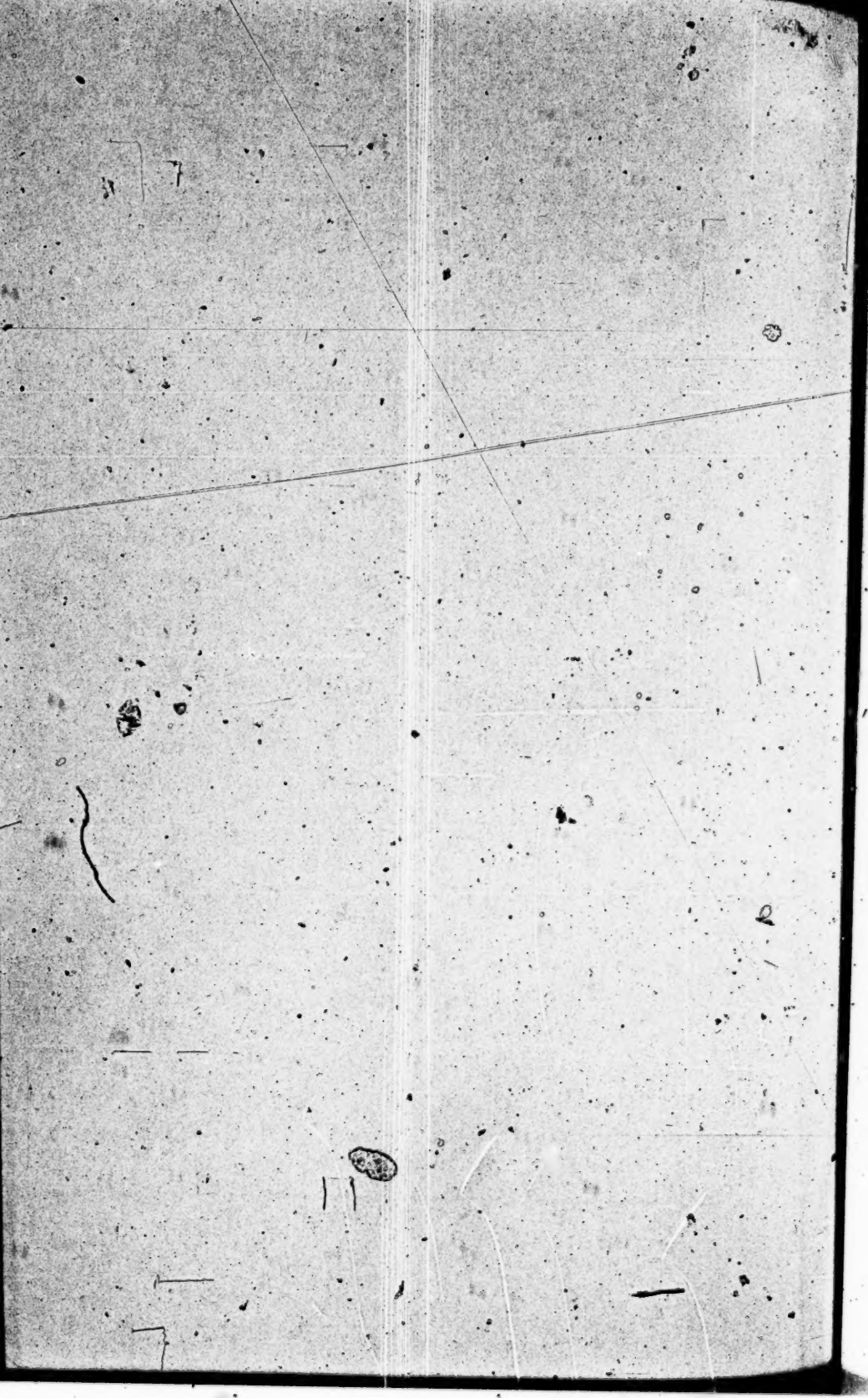
Assistant Attorney General of Ohio,
Counsel for Appellee, The Public Utilities Commission of Ohio.

Columbus, Ohio, March 7, 1934.

TOOTHAKER & RODENFELS, Law Printers, Columbus, Ohio.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 609.

THE DAYTON POWER AND LIGHT COMPANY,
Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO,
Appellee.

BRIEF ON BEHALF OF APPELLEE.

STATEMENT OF THE CASE.

The "statement of the case" in appellant's brief, (pp. 2-6) contains certain allegations with which appellee cannot agree. It is necessary therefore, that appellee restate the case which it will attempt to do as briefly as possible.

The case is in this court on appeal from a judgment

of the Supreme Court of Ohio affirming an order made by appellee, the Public Utilities Commission of Ohio, denying the appellant the right to increase its rates for natural gas service to some fourteen thousand (14,000) consumers in the communities of North Hampton, Piqua, Sidney, South Charleston, Tippecanoe City, Troy, territory adjacent to Troy, Washington C. H., and Wilberforce, Ohio. The rates sought to be increased had been in effect in these communities for many years prior to the application for the increase here involved. (R., 129.) This application for an increase in rates was filed on June 17, 1929, under the provisions of Section 614-20 of the General Code of Ohio, as it then existed. (110 Ohio Laws, 366—Appendix.) On March 12, 1929, there had been passed by the Ohio Legislature, an act (also Sec. 614-20) which was approved and filed with the secretary of state on March 20, known as the Carpenter Act, (113 Ohio Laws, 17, Appendix), which act repealed the provisions of the former Section 614-20, then known as the Pence Law, the act under which this increase in rates was filed, and substituted therefor a new procedure for such a case as this, by virtue of which an increase in utility rates could not be put into effect until after the appellee had determined that such increased rates were just and reasonable. The effective date of this new act was June 18, 1929, just one day after the filing of appellant's application in this case.

However, appellant, proceeding under the Pence Law, (Section 614-20 prior to July 18, 1929), elected to put into effect its proposed increase in rates after the ex-

piration of one hundred twenty (120) days as provided in said Pence Law, posting a bond guaranteeing the repayment of the increase in rates collected thereunder if they subsequently should be found to be unreasonable. Appellant has been collecting these increased rates down to the present time. The appellant undoubtedly instituted this proceeding at the time it did, in order that it might have the benefit of the collection under bond provisions of the old Pence Law, for had it waited twenty-four hours, the new law (Carpenter Act, present Section 614-20) would have been effective.

Appellant is a distributing company. That is, it owns the gas distribution plants in the communities it supplies with gas, but does not own any gas producing lands or transmission pipelines. It buys its gas supply from The Ohio Fuel Gas Company under wholesale contracts, which call for the payment of forty-five cents (45¢) per M c. f. delivered at the several town borders or city gates.

The Dayton Power and Light Company is affiliated with The Ohio Fuel Gas Company and both companies are under the management of the parent company, The Columbia Gas and Electric Company. (R., 222.)

Several hearings were held by appellee and testimony was presented by witnesses for this appellant as to the valuation of that portion of the distribution system of the appellant allegedly used in serving the communities involved in this case. As a result of these hearings, the appellee found a valuation for appellant's distribution system as of July 17, 1929 (date certain) in the sum of

$868,338.00, which was $381,834.00 less than the $1,250,221.00 claimed by the appellant. In arriving at its valuation, the appellee accepted the figures of the appellant as to all but six items involved in the valuation. These items and the differences in the amounts claimed by the appellant and those allowed by the appellee were as follows:

Table I.

Property Items	Claimed by Appellant	Allowed by Appellee	Difference
Organization or pre-construction cost...	$24,774.00	$00.00	$24,774.00
Cost of financing.....	39,600.00	00.00	39,600.00
Distribution line equipment	474,131.00	334,586.00	*139,545.00
Going concern value..	125,000.00	00.00	125,000.00
Undistributed construction expenditures or general overheads..	130,640.00	99,045.00	31,595.00
Working capital.....	83,200.00	61,880.00	21,320.00

In its brief, appellant (p. 4) refers to its valuation of $1,250,221.00 as having been established by the "uncontradicted evidence" and labels the amounts claimed by it and disallowed by appellee either in part or in whole, as "appellant's proof." If the purely speculative and conjectural testimony of witnesses on behalf of appellant, which, in fact, was nothing more than the guesses of such witnesses as to the amounts which in

*This difference is occasioned entirely by the disallowance of the amount claimed for cutting and restoring paving.

their opinion should be allowed for such items as organization or preconstruction cost, cost of financing, cost of cutting and restoring paving, going concern value, general overheads or undistributed construction expenditures and working capital, constitutes "uncontradicted evidence" and "proof" even though such speculations and conjectures violate well-established principles of law, then perhaps appellant's statements are correct, otherwise they are not.

During the progress of the hearing on valuation in this case, it became apparent to appellee that the purchase price of gas was of such importance that it could not pass upon the fairness of the proposed increased rates until it had determined the justness of the gateway price of gas and accordingly on November 21, 1930, appellee entered its finding and order (R., 128-134) directing appellant to produce "all the evidence available touching the cost of producing or acquiring and transmitting the gas to the several gateways and of the fairness of the gateway rate of forty-five cents (45¢)." (R., 134; P. U. R., 1931-A, 336.) At the time of the entry of said finding and order, there was pending before appellee, case numbered 5935 involving the rates for natural gas sold in the city of Columbus, (Ohio), by The Columbus Gas and Fuel Company, which is also a distributing company only, and is likewise a subsidiary of The Columbia Gas and Electric Corporation, and which company purchases its supply of natural gas from The Ohio Fuel Gas Company, (the same company which furnishes gas

to appellant), at the city gate, and after the hearing and decision in that case, a portion of the evidence offered in it was introduced by stipulation in this case, together with the finding of facts and order of the appellee in said case. (R., 138, 139.) Both the majority opinion and minority opinion of appellee in the Columbus case are found in the record. (R., 129-220, inclusive.)

Thereafter on November 3, 1932, the appellee issued its finding of facts and decision in this case, (R., 220, 225) wherein the appellee recited that it having arrived at the conclusion that the gate price to be paid by the distributing company to the producing and transporting company should be thirty-nine cents (39¢) per M c. f. (Majority Opinion, R., 222; Minority Opinion, 31.7¢ per M c. f., R., 228) it must necessarily follow that the increased rates here involved should be rejected. Such a reduction in the gateway price, naturally resulted in a reduction in appellant's annual operating expenses on account of gas purchased to the extent of $71,547.00. The entire reduction in operating expenses made by appellee

and the items involved therein, are shown by the following table:

Table II.

Item Involved	Claimed by Appellant	Allowed by Appellee	Difference
Gas purchased for resale	$536,611.00	$465,064.00	$71,547.00
General administrative expenses	38,395.00	32,432.00	5,963.00
Depreciation allowance	43,981.00	13,721.00	30,260.00
Taxes—			
Excise	9,172.00	9,163.00	9.00
Public Utilities Commission of Ohio	292.00	348.00	56.00+
Income (federal)	00.00	7,697.00	7,697.00+

Summarizing, it appears that the appellee reduced the valuation as claimed by the company $381,834.00 and operating expenses as claimed by the company $104,198.00.

A reading of appellant's statement of facts would indicate that no evidence was introduced in the Columbus Gas case (No. 5935) and incorporated into this case by stipulation (R., 135, 136, 138) to controvert the contentions of appellant. (Appellant's Brief, p. 3.) Such statements are not correct. A large amount of evidence

Note—These differences are computed on the basis of the rates which were in existence prior to the increase.

and a great many exhibits were introduced by the city of Columbus in that case in contravention of appellant's claims as to a fair gate price for gas and that evidence was stipulated into this case. (R., 135, 136, 138.)

Having found that the increased rates being collected by appellant under bond were not justified, the appellee, on November 3, 1932, ordered appellant to cease charging the rates set forth in the new schedules filed by appellant on June 17, 1929, and to refund to its consumers the difference between the rates being collected under said schedules and those in effect prior to July 17, 1929. (R., 225.)

In its statement of the case (Appellant's Brief, p. 5) appellant says that appellee found that appellant was entitled to a return of six and one-half per cent. (6½%). More correctly, the appellee found that on the basis of its valuation and operating expenses as fixed by the appellee the appellant had earned slightly in excess of 6½%. (R., 223.)

Appellant duly filed application for rehearing and also a protest against the property valuations made by appellee. The protest was dismissed and the application for rehearing denied. On December 21, 1932, appellant filed its petition in error in the court below, which, on June 1, 1933, handed down its decision affirming the order of appellant, *(The Dayton Power & Light Co. v. The Public Utilities Commission of Ohio,* 127 O. S., 137, R., 82) and stated that the principles of law necessary to the decision of this case had been considered in the case of The Columbus Gas & Fuel Company against

the Public Utilities Commission of Ohio, decided the same day, and applied to it, "the reasoning and conclusions of the law announced in the Columbus case." (R., 86.) In the Columbus case (127 O. S., 109; R., 58) the court reversed appellee, holding among other things that a gate price for the city of Columbus, of thirty-nine cents (39¢) per M c. f. was excessive. In this case, applying the conclusions of law laid down in the Columbus case, it affirmed the appellee, for it should be obvious that if a gate price of thirty-nine cents (39¢) per M c. f. would not justify the increase in rates contended for by appellant and allowed by appellee, then a leser gate price as fixed by the Supreme Court of Ohio would justify it less. In its statement, appellant alleges (Appellant's Brief, p. 6) that appellee based its rate order upon conditions as they appeared to it to be on November 3, 1932, instead as they were on July 17, 1929, the day certain. We cannot agree with this statement, and appellant neglects to cite any portion of the record to sustain this allegation.

A summary of the differences in the contentions of appellant and appellee is contained in the decision of the Supreme Court of Ohio in this case. (*The Dayton Power and Light Company v. The Public Utilities Commission of Ohio*, 127 O. S., 137; R., 82, at 84, 85.) The historical development of the case is set forth in the various orders of appellee. (R., 123-254, inclusive.)

ERRORS COMPLAINED OF AND ISSUES PRESENTED.

Under the foregoing heading at page 7 of its brief (Appellant's Brief, p. 7) appellant recites that the assignment of errors contains twenty-nine paragraphs, (R., 4-17) and that the points to be relied upon were numbered seven (R., 639-643) and that the several assignments of error and points relate to the findings and order of appellee (affirmed by the court) in (1) fixing the value of appellant's property, (2) making allowance for its operating expenses, (3) fixing rate of return to which it is entitled, and (4) directing it to refund to consumers the difference between its present and prior schedule of rates.

In this brief appellee has confined itself to answering the arguments of the appellant in its brief. Many additional arguments might have been advanced by appellee to sustain its position but in the interests of economy of time, space and money it has refrained from discussing any element not raised in the brief of appellant and in so far as possible it has followed the order of discussion set up in appellant's brief.

SUMMARY OF ARGUMENT.

I.

The Rate Base as Fixed by Appellee and Affirmed by the Court Below in the Sum of $868,387 is the Maximum Amount to Which Appellant Was Entitled Under the Law and the Evidence.

The amounts claimed by the company as to the value of the majority of the elements entering into the valuation of its distributing plant were allowed by appellee without any reduction whatever. The few items disallowed by appellee either entirely or in part are as follows:

A. Items for which no allowance made.

1. Organization or preconstruction costs.
2. Cost of financing.
3. Cost of cutting and restoring paving over pipe lines.
4. Going concern value.

Organization or preconstruction costs—No amount for organization or preconstruction costs could be justifiably allowed upon the basis of the purely speculative and conjectural testimony of the appellant's witnesses and in the absence of any evidence that such costs actually had been incurred in the past or actually would be incurred

in the future. *Denver v. Denver Union Water Company*, 246 U. S., 178; *The Los Angeles Gas and Electric Corporation v. The Railroad Commission of California, et al.*, 289 U. S., 287, 310, 77 L. Ed., 1180, 53 S. Ct., 637; *Wabash Valley Electric Company v. Young*, 287 U. S., 488, 500, 77 L. Ed., 447, 455, 53 S. Ct., 234; *Minnesota Rate Cases*, (Simpson v. Shepard), 230 U. S., 352, 452, 57 L. Ed., 1511, 1563, 33 S. Ct., 729.

Cost of financing—No allowance for cost of financing could be justifiably permitted upon the basis of the purely speculative and conjectural testimony of appellant's witnesses and in the absence of any evidence that any such cost has been incurred in the past or actually would be incurred in the future. *Wabash Valley Electric Company v. Young*, 287 U. S., 488, 500, 77 L. Ed., 447, 455, 53 S. Ct., 234; *Los Angeles Gas and Electric Corporation v. Railroad Commission of California, et al.*, 289 U. S., 287, 310, 77 L. Ed., 1180, 53 S. Ct., 637; *Galveston Electric Company v. Galveston*, 258 U. S., 388; *Vincennes Water Supply Company v. Public Service Commission*, 34 F. (2d), 5, 9; *Georgia Railway and Power Company v. Railroad Commission*, 262 U. S., 625; *Georgia Railway and Power Company v. Railroad Commission*, 278 Fed., 242; *Winona v. Wisconsin-Minnesota Light and Power Company*, 276 Fed., 996; *Portsmouth Gas Company v. Ohio Public Utilities Commission*, 119 O. S., 24, 32.

This law which is so well established by this court is not affected by the Ohio statutes and particularly Gen-

eral Code 499-9, Sub-section G. (Appendix.) *Portsmouth Gas Co. v. Ohio Public Utilities Commission,* 119 O. S., 24, 32.

Cost of cutting and restoring paving over pipe lines—The exclusion of all costs for paving cut and replaced other than that cut and replaced at the time of original installation is so clearly established that it is not now open to dispute. *Des Moines Gas Company v. Des Moines,* 238 U. S., 153; *Columbus Gas and Fuel Company v. City of Columbus,* 17 Fed. (2d), 630, 633; *Valuation of Public Service Corporations* (2d Ed., 1928), (by Robert H. Whitten and Delos F. Wilcox), (p. 778).

Going concern value—Where evidence of reproduction cost new less depreciation using current prices as of a date certain plus liberal general overheads, working capital and materials and supplies is given due consideration, in connection with other competent evidence in arriving at fair value, it is manifest that under the law going concern value has been given all the consideration it deserves and no separate allowance therefor is necessary. *Columbus Gas and Fuel Company v. Public Utilities Commission,* 127 O. S., 109, 187 N. E., 7; *Cincinnati and Suburban Bell Telephone Company v. Public Utilities Commission,* 113 O. S., 259; *Hardin-Wyandot Lighting Company v. Public Utilities Commission,* 118 O. S., 592, 603; *Portsmouth Gas Company v. Public Utilities Commission,* 119 O. S., 24; *City of Houston v. Southwestern Bell Telephone Company,* 259 U. S., 318; *Galveston Electric Company v. Galveston,* 258 U. S., 388; *Des*

Moines Gas Company v. City of Des Moines, 238 U. S., 153; *New York Telephone Company v. Prendergast*, 36 Fed. (2d), 54; *Los Angeles Gas and Electric Corporation v. Railroad Commission of California, et al.*, 289 U. S., 287, 310, 77 L. Ed., 1180, 53 S. Ct., 637.

B. Items for which a reduced allowance was made by appellee.

1. Undistributed construction expenditures or general overheads.

2. Working capital.

Undistributed construction expenditures or general overheads. In the absence of any evidence as to the actual amount of general overheads or undistributed construction expenditures made by appellant and where no evidence is introduced to show that any such costs have been capitalized on its books it was not error on the part of appellee and the court below to reduce the claim of appellant for this item from 17% to 14%, particularly when appellant's claim was based on purely speculative and conjectural testimony. The amount allowed appellee for this item (14%) exceeds the amount that has been allowed in many other cases and is ample. The recital of what may have been allowed by other commissions and courts in different places at different times and under different circumstances is of little value in determining what is a proper allowance in this case at this time and under the circumstances here involved. *Hardin-Wyandot Lighting Company v. Public Utilities Commission,*

118 O. S., 592, 610; *Portsmouth Gas Company v. Public Utilities Commission of Ohio*, 119 O. S., 24, 31; *Logan Gas Company v. Public Utilities Commission of Ohio*, 121 O. S., 507, 510; *United Fuel Gas Company v. Public Service Commission of West Virginia*, 14 Fed. (2d), 209, P. U. R., 1927A, 707 (1926) (affirmed by the Supreme Court of the United States, 278 U. S., 322).

Working capital—The amount to be allowed for working capital is a matter of judgment depending upon the circumstances in each case. Upon the basis of the evidence in this case and in the light of all the circumstances, the amount allowed by appellee and affirmed by the court below was ample. The mere statement by witnesses on behalf of the appellant that it was entitled to a working capital in an amount far in excess of its actual needs is not evidence which must be accepted by an administrative commission without question, particularly where the record discloses that the amount claimed is far in excess of the amount required to properly conduct appellant's business.

II.

Amount Allowed Appellant For Its Annual Operating Expenses Was Generous.

Appellee allowed as annual operating expenses every item claimed by appellant with the exception of the amounts claimed for cost of purchased gas, annual depreciation, taxes and administrative expenses. The total difference for annual operating expenses as claimed by

appellant and allowed by appellee was $104,198.00. (Appellant's Brief, p. 53.) Of this total difference, $71,547.00 represents a reduction in the cost of gas purchased, and $30,260.00 represents the reduction in the allowance for annual depreciation.

Administrative expenses and taxes. Appellant does not discuss the small reduction in administrative expenses and discusses the subject of taxes but briefly. The action of appellee in computing the excise tax on the basis of the tax as it existed as of July 17, 1929 (the date certain) and not on the basis of a subsequent enactment of the Legislature (April 5, 1932), is, of course, sound. Appellee made every tax allowance credit according to law for 1929 and there is nothing in the record of this case to show the revenues and expenses for this applicant for the succeeding years allocated to this area. It would be absurd to give effect in a 1929 rate study to a 1932 enactment of the Legislature.

Annual depreciation allowance. The annual depreciation allowed by appellee is ample and sufficient and represents the actual percentage used by the appellant for this item and the fairness of such an allowance is fully sustained by the record in the Columbus Gas case. Appellant claims for this item 4 per cent. of its depreciable plant, but in view of the fact that 2 per cent. represents the actual percentage used by the appellant under which percentage it has been able to maintain, in its own language "a well established utility furnishing a necessary service * * * operated upon a high efficiency

basis'' (Appellant's Brief, p. 41), its contention is not well-founded.

The cost of gas purchased. The appellant (a distributing company) is a subsidiary of The Columbia Gas and Electric Corporation. It purchases its gas at the city gates from The Ohio Fuel Gas Company, an affiliate company and likewise a subsidiary of The Columbia Gas and Electric Corporation. The amount claimed by appellant for cost of gas purchased is 45 cents per M c. f. based upon its contract with its affiliate, The Ohio Fuel Gas Company. Appellee required appellant to produce all available evidence touching the cost of producing such gas in order that it might determine the fairness of the contract price. Appellee's authority to require such evidence has been clearly established by this court. *Western Distributing Company v. Public Service Commission of the State of Kansas et al.*, 285 U. S., 119, 76 L. ed., 655, 52 S. Ct., 283; *Smith v. Illinois Bell Telephone Company*, 282 U. S., 133, 75 L. ed., 255, 51 S. Ct., 65; *State Corporation Commission v. Wichita Gas Company*, 290 U. S., ...

It is equally well established that the market value of gas is not the test as to the just price therefor in a contract made between affiliated companies operating under one common ownership. *Western Distributing Company v. Public Service Commission of the State of Kansas et al., supra; Smith v. Illinois Bell Telephone Company, supra; State Corporation Commission v. Wichita Gas Company, supra.*

Upon the evidence taken in the Columbus Gas case

(No. 5935 before the appellee) and incorporated into the record of this case by stipulation, appellee (majority) found that 39 cents per M c. f. was a fair and just price for gas at the city gates of the towns served by appellant's distributing plants (Minority 31.7 cents per M c. f.). The amount allowed appellant by appellee in this case as the cost of gas purchased exceeds by at least 7.3 cents per M c. f. the amount allowed by the lower court in the Columbus Gas case for the same item.

In arriving at a fair gate price of 39 cents per M c. f., appellee found that *the value of gas well construction* (Account 211) *and gas well equipment* (Account 212) *The Ohio Fuel Gas Company* should be fixed by deducting from the reproduction cost of said property an amount for depreciation based upon the percentage of decline in rock pressure of existing gas wells. The propriety of this method was fully established by the evidence.

In its treatment of *unoperated leaseholds—The Ohio Fuel Gas Company,* appellee found that only those leaseholds known as Class One or operated leaseholds were actually used and useful and excluded from the valuation unoperated leaseholds known as Classes Two, Three and Four. This finding affirmed by the court below was fully sustained by the evidence and the law. Section 499-9, Ohio General Code; *Logan Gas Company v. The Public Utilities Commission of Ohio,* 121 O. S., 507, 169 N. E., 575; *Logan Gas Company et al. v. The Public Utilities Commission of Ohio,* 124 O. S., 248, 249, and 177 N. E., 577; *The Columbus Gas and Fuel Company*

and the City of Columbus v. The Public Utilities Commission of Ohio, 127 O. S., 109, 187 N. E., 7 (Record, 50, 62, 63); *United Fuel Gas Company v. Public Service Commission of West Virginia*, 14 Federal (2d), 209; *United Gas and Fuel Company v. Public Service Commission of West Virginia*, 278 U. S., 322, 73 L. ed., 402, 49 S. Ct., 157; *Los Angeles Gas and Electric Company v. Railroad Commission*, 289 U. S., 287, 305; *San Diego Land and Town Company v. National City*, 174 U. S., 739, 757, 43 L. ed., 1154, 1161, 19 S. Ct., 804; *Smyth v. Ames*, 169 U. S., 466, 547 L. ed., 819, 849, 18 S. Ct., 418; *Willcox v. Consolidated Gas Co.*, 212 U. S., 19, 41, 53 L. ed., 382, 395, 29 S. Ct., 192; *Minnesota Rate Cases (Simpson v. Shepard)*, 230 U. S., 352, 434, 57 L. ed., 1511, 1555, 33 S. Ct., 729; *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission*, 262 U. S., 276, 287, 67 L. ed., 981, 984, 43 S. Ct., 544; *Georgia R. & Power Co. v. Railroad Commission*, 262 U. S., 625, 631, 67 L. ed., 1144, 1147, 43 S. Ct., 680; *Bluefield Waterworks & Improvement Co. v. Public Service Commission*, 262 U. S., 679, 690, 67 L. ed., 1176, 1181, 43 S. Ct., 675; *McCardle v. Indianapolis Water Co.*, 272 U. S., 400, 410, 71 L. ed., 316, 325, 47 S. Ct., 144; and *St. Louis & O'F. R. Co. v. United States*, 279 U. S., 461, 484, 485, 73 L. ed., 798, 808, 809, 49 S. Ct., 384.

In its treatement of *operated leaseholds—The Ohio Fuel Gas Company*, it was found by appellee that appellant had failed to establish a market value for the operated acreage of The Ohio Fuel Gas Company and

that the bases assumed by the appellant's witnesses for determining value, were wholly speculative and uncertain. It must be remembered that these leaseholds are being used in a regulated utility business where rates to be charged consumers cannot be built up by employing a value that depends on earning capacity. Under the evidence and the law, with the burden of proof resting upon the appellant, the value for this item could not reasonably by fixed at an amount greater than the book value assigned by The Ohio Fuel Gas Company, though, as a matter of fact, the amount allowed appellant for this item by appellee exceeded the book value therefor, by approximately $2,500,000.00. *United Fuel Gas Company v. Public Service Commission of West Virginia,* 14 Federal (2d), 209; *City of Charleston v. Public Service Commission,* 110 W. Va., 245, P. U. R. 1931 E-74; *United Fuel Gas Company et al. v. Railroad Commission of Kentucky,* 278 U. S., 300, 417, 73 L. Ed., 390, 49 S. Ct., 150; *Logan Gas Company, et al. v. Public Utilities Commission of Ohio,* 124 O. S., 248, 249, 177 N. E., 577.

In its treatment of *amortization and depreciation—The Ohio Fuel Gas Company,* appellee made an allowance of $4,158,954.00 for amortization. The lower court in the case of *The Columbus Gas and Fuel Company v. The Public Utilities Commission of Ohio, et al.,* 127 O. S., 109, 187 N. E., 7, disallowed this item. However, in this case, even on the basis of inclusion of the item, the gate price for cost of gas purchased was found to be insufficient to authorize appellant's application for an increase in its rates.

In its treatment of *delay rentals on unoperated leaseholds—The Ohio Fuel Gas Company*, appellee found that no allowance for the annual rentals paid by The Ohio Fuel Gas Company on its unoperated leaseholds could be included. Since the unoperated acreage cannot be included legally in the valuation, it necessarily follows that the expenses of carrying it, known as "delay rentals" cannot be charged as an operating expense against existing gas consumers. The finding of the appellee in this respect was properly affirmed by the court below. *The Columbus Gas and Fuel Company v. The Public Utilities Commission of Ohio*, 127 O. S., 109, 187 N. E., 7. (R., 58.)

III.

A Minimum Rate of Return of 6½% for the Period From July 17, 1929 Down to the Present Time Is Fair and Reasonable and Is Not Confiscatory.

The contention of the appellant that it is entitled to a minimum rate of return of 8% for the period from July 17, 1921 down to the present time is entirely unwarranted. The return allowed by the appellee and affirmed by the court for the period in question under the circumstances in this case does not result in confiscation of appellant's property. *Smith v. Illinois Bell Telephone Company*, 282 U. S., 133, 75 L. ed., 255, 51 S. Ct., 65; *Chesapeake and Potomac Telephone Company v. Whitman*, 3 Fed., 938, 953; *Wabash Valley Electric Company v. Young*, 287 U. S., 488, 77 L. ed., 447, 53 S. Ct.,

234; *Los Angeles Gas and Electric Company v. Railroad Commission of California, et al.*, 289 U. S., 287, 77 L. ed., 1180, 53 S. Ct., 637; *Illinois Bell Telephone Company v. Gilbert, et al.*, 3 Fed. Sup., 595; *Atchison-Topeka and Santa Fe Railway Company v. United States*, 284 U. S., 248. The contention of the appellant that it is entitled to an unusually high rate of return on the basis of the hazardous nature of the gas business is based upon a theory which has long since been exploded.

IV.

The Order of the Appellee Affirmed by the Lower Court Requiring Appellant to Refund the Difference in the Amount Collected Under the Increased Rates Effective July 17, 1929 and the Rates That Were in Existence Prior to That Date Is Fully Sustained Under the Law and Evidence Applicable to This Case.

It is apparent that if the decision of the appellee, which was affirmed by the court below, is correct, then the order of refund is entirely proper. The entire question presented in this case is as to whether or not appellant's increased schedule of rates filed effective July 17, 1929, was justified. The appellee and the lower court having found that they were not, appellant under the provisions of the Pence Law (Section 614-20 prior to July 18, 1929, Appendix) is bound to refund to its consumers the excess rates found to have been collected by it thereunder.

V.

The Court Below Thoroughly Reviewed the Finding and Order of the Appellee in This Case and on Basis of Such Review Affirmed the Order of Appellee.

The contention of the appellant that the court below did not consider the testimony and exercise its own independent judgment thereon is without merit and is not worthy of serious consideration.

VI.

The Appellant Was Not Entitled to a Rehearing.

The contention that the finding of the court below to the effect that the laws of Ohio make no allowance for amortization as distinguished from depreciation is of no consequence in this case for upon the basis of an allowance for amortization of $4,158,954 by appellee still the appellee found that the increased rates as set forth in appellant's application filed with appellee on June 18, 1929, were not justified. If the disallowance of this item by the court below was correct, then the rate of return to appellee in this case under its old rates is considerably increased over and above the amount to which appellee held that it was entitled.

ARGUMENT

I.

VALUATION OF APPELLANT'S PROPERTY.

1. The Contention that the Court Erred in Making No Allowance for Appellant's Organization or Preconstruction Costs.

No amount for organization or preconstruction costs could be justifiably allowed upon the basis of the purely speculative and conjectural testimony of appellant's witnesses and in the absence of any evidence that such costs actually had been incurred in the past or actually would be incurred in the future.

This item in the amount of $24,774.00, as claimed by the appellant, is presumed to represent preorganization costs which have been or might be incurred by the appellant in reproducing its property. In the classified system of accounts, it is known as Account 200. The annual reports filed with the appellee by the appellant reveal that nothing is shown on the books of the appellant for this account.

It should be remembered that the appellant is purely a local distributing company receiving its gas at the city gate and when the territory concerned in this procedure is considered, involving as it does eight small towns and approximately 14,000 consumers, the fallacy of the appellant's contentions in this regard becomes apparent.

If we are to reconstruct the plant of the appellant in these territories as of 1929 or 1930; it is perfectly proper to consider the remainder of the appellant company as in existence. It is equally proper to consider the public of these communities anxious and desirous of receiving the service which they now enjoy. All of the items which the appellant's engineers testify as being necessary to consider would be known.

It is absurd to discuss such matters as preliminary determination of rates and supply of gas as contained in the testimony of Mr. Emery (R., 281 and 282) when all these facts are known in advance. This item, in so far as it is involved in this case, is so purely theoretical that it was wholly disregarded in the light of the testimony of the appellant's witnesses, coupled with the fact that the appellant has never experienced such costs so that they now appear on the books of the company.

To say that this appellant, serving the city of Dayton and other centers, would expend the sum of $24,774.00 before it had determined to extend its service to the communities herein concerned would be to wholly disregard the existing conditions as of the date certain.

Nor do we agree with the statement of counsel for appellant that commissions and courts have quite uniformly recognized the necessity of including an adequate allowance to cover this item in the valuation of utility property. (Appellant's Brief, p. 24.)

In *Denver v. Denver Union Water Company* (246 U. S., 178), the findings of the master were approved by

this court and the method of valuation which he adopted was expressly commended. In his valuation, the master made an allowance of 12½ per cent. on the structural cost of the property for "engineering and contingencies" and allowed no other general overheads except interest during construction. An item for "preliminary expenses and organization" was disallowed, (Master's Report, pp. 21-22), with the following statement:

> "The water company (Ex. C, page 64) claims that $120,000, on account of 'preliminary expenses and organization,' should be included in the estimate of the value of the property it is using to serve the public. Mr. Metcalf explained this item as follows (Vol. 4 (C), page 1700):
>
> 'That item is assumed to cover the expenses of preliminary investigation by engineers and others, the incidental legal work, the formation work, if you like; the work of acquiring the franchise—that is, the legal work—filings, attendance on meetings incident to that, and, in short the general preliminary expenses which might be incurred incidental to an investigation of the project and the organization of the corporation.'
>
> The witness further states that in his judgment, the amount was reasonable, conservative.
>
> The allowance elsewhere made for the company's engineering and contingencies is, in my judgment, reasonably sufficient to cover all preliminary investigation by engineers and others. No franchise exists in this case and the cost of its acquisition cannot be allowed. This item is disallowed."

The Denver case was decided approximately three years later than the case of the *Des Moines Gas Company v. Des Moines* (238 U. S., 153) referred to by appellant.

It is interesting to note that in the Des Moines case, while the court apparently approved an item of $6923.00 for organization expenses, allowed by the master, that the master had made a specific allowance for organization in that case because, as he said, the organization expenses were shown to have been $6923.00, i. e., he took the actual proven experience of the company for this item.

The only other decision of this court cited by appellant to sustain its position as to this item is the case of *The Ohio Utilities Company v. Public Utilities Commission* (267 U. S., 359). That case is clearly distinguishable from the instant case, for the reason that in The Ohio Utilities Company case there was evidence in the record testified to by the commission's own engineers that an allowance for organization costs should be made.

There is no such evidence in this record, and the fact that it should not be allowed, we believe, is recognized by the Columbus company who does not even ask for it. A purely distributing company such as the appellant surely would not experience such an expense, and the wholly speculative testimony of Mr. Lerch, Mr. Hamilton and Mr. Emery on behalf of the appellant (R., 269-286) was not sufficient to have justified the appellee in allowing this item.

The position of the appellee in disallowing the item, we believe, is fully sustained by the decision of this court in *The Los Angeles Gas and Electric Corporation v. The Railroad Commission of California, et al.*, 289 U. S., 287,

310, 77 L. Ed., 1180, 53 S. Ct., 637, decided May 8, 1933, wherein this court held as follows:

> "6. Coming to cost of reproduction, we agree with the court below that the items included in the company's estimate for 'cost of financing, $5,921,-470,' and 'promoters' remuneration, $2,500,000,' were too conjectural to be allowed. Wabash Valley Electric Co. v. Young, 287 U. S., 488, 500, ante, 447, 53 S. Ct., 234."

Similarly this court stated in Minnesota rate cases, *Simpson v. Shepard*, 230 U. S., 352, 452, 57 L. Ed., 1511, 1563, 33 S. Ct., 729:

> "The cost-of-reproduction method is of service in ascertaining the present value of the plant when it is reasonably applied and when the cost of reproducing the property may be ascertained with a proper degree of certainty. But it does not justify the acceptance of results which depend upon mere conjecture."

The purely conjectural nature of the testimony of the appellant's witnesses, in the instant case, is well illustrated by Witness Emery who at the conclusion of his testimony, under questioning by the appellee, admitted that the estimate he had made for this particular item of organization or preconstruction costs would be the same irrespective of whether or not the property in question was being reconstructed as a single unit or whether this property was being reconstructed as a part of The Dayton Power and Light Company, (R., 286),

which company counsel for the appellant, in their brief, refer to in the following language:

> "Appellant is a well-established utility, furnishing a necessary service and was shown to be operated on a high efficiency basis." (Appellant's Brief, p. 41.)

Upon the record in this case and the law appellee was fully justified in disallowing this item.

2. The Contention that the Court Erred in Making No Allowance for Appellant's Cost of Financing.

No allowance for costs of financing could be justifiably permitted upon the purely speculative and conjectural testimony of appellant's witnesses and in the absence of any evidence that such costs actually had been incurred in the past or actually would be incurred in the future.

The appellant claims $39,600 for this item. Again it disregards existing facts. The testimony of the appellant's witnesses is based upon erroneous assumptions of fact and is so speculative and theoretical as to be without probative value. The four witnesses whom the appellant introduced in this connection all sought to substantiate an allowance of 4% of the cost of physical property as the cost of obtaining the money necessary to build it. None of these witnesses gave any consideration to the excellent financial condition of the appellant company as a whole but assumed that they were starting out with a new company having no affiliations and no banking connections. The appellee in reaching its deci-

sion to disallow the amount claimed for cost of financing determined to consider some of the actualities rather than indulge wholly in theory.

No testimony was introduced by any of the witnesses for the appellant as to any actual expenditure incurred by appellant and carried on its books as a cost of financing the property under consideration. On the contrary, each witness admitted that his calculations were purely on a basis of his estimate of cost of financing. This testimony which is contained in the record (R., 286-341) is entirely speculative and conjectural and, in our opinion, comes clearly within the rule announced by this court in the recently decided case of *Wabash Valley Electric Company v. Young*, 287 U. S., 488, 500, 77 L. Ed., 447, P. U. R., 1933A, 433, 53 S. Ct., 234, and the still more recent decision of this court in the case of *Los Angeles Gas and Electric Corporation v. Railroad Commission of California, et al.*, 289 U. S., 287, 77 L. Ed., 1180, 53 S. Ct., 637.

In the Wabash case this court at page 500 said:

> "Complaint is made that in determining the value of the Martinsville property no allowance was made for cost of financing. As the court below, however, pointed out, there was no evidence that such cost was incurred, or that it necessarily would be incurred in the event of reconstruction. This is also in accordance with the findings of the master. We see no reason to interfere."

In the Los Angeles case the court at page 310 said:

> "Coming to the cost of reproduction, we agree with the court below that the items included in the company's estimate for 'cost of financing $5,921,-

470,' and 'promoters' remuneration $2,500,000,' were too conjectural to be allowed."

In other words, in two of the most recent decisions of this court cost of financing based upon estimates made without any actual evidence that such costs would be incurred were disallowed. Significantly enough, the appellant in its brief covering this item has sought elsewhere than the decisions of this court for some authority to sustain its contention for the allowance of the 4% claimed as a cost of financing. They attempt (Appellant's Brief, p. 33) to differentiate the decision of this court in *Wabash Valley Electric Company v. Young*, 287 U.S., 488, 500, from the present case. A study of the two cases, however, fails to reveal any dissimilarity. As has been heretofore indicated, the evidence of appellant's witnesses as to cost of financing was not based upon any actual costs incurred in connection with the property under consideration or what would be incurred in connection with this property but was confined to a general statement of a fixed percentage which they claim is usually incurred in the reproduction of a public utility's property. (R., 289, 308.)

Counsel for appellant failed to make any mention in their brief of the decision of this court in *The Los Angeles Gas and Electric Corporation v. Railroad Commission of California, et al.*, 289 U. S., 287, 53 S. Ct., 637, 77 L. Ed., 1180.

If additional authority were needed to sustain the appellee's action in disallowing this item it could be found

in *Galveston Electric Company v. Galveston*, 258 U. S., 388, wherein this court affirmed the decree of the United States District Court for the Southern District of Texas, disallowing an item of $67,078 for brokerage which had been allowed by the master. This court in its opinion approving the exclusion of the item at page 397 said:

> "The finding of the master rests upon testimony that bankers customarily get, in some form, compensation equal to 4% on the money procured by them for such enterprises."

It will be observed that the amount disallowed by this court in that case was identically the same amount that was disallowed by the appellee in this case and that the testimony upon which the allowance was originally made by the master in the Galveston case was similar to the testimony upon which the appellant relies in this case.

In *Vincennes Water Supply Company v. Public Service Commission*, 34 F. (2d), 5, 9, cited with approval by this court in *Wabash Valley Electric Company v. Young*, 287 U. S., 488, 500, the court in disallowing the amount claimed for cost of financing, said:

> "Appellant contends there should be included in the valuation an item of $65,000 for cost of financing, and, while there may be circumstances under which consideration of such an item is proper, there is no fact in this record that would establish the propriety of such inclusion. It has not been shown that there has been any expense in the financing, and if there has been none, none should be included."

Numerous other decisions of the federal courts might be cited further sustaining the action of the appellee in

disallowing the cost of financing claims of the appellant in this case. In *Georgia Railway and Power Company v. Railroad Commission,* 278 Fed., 242, the court disallowed the sum of $500,000 claimed by the company for cost of original financing and this decision by the District Court was affirmed by this court in *Georgia Railway and Power Company v. Railroad Commission,* 262 U. S., 625, although on the appeal to this court in that case the item for cost of financing does not seem to have been stressed by the company. In *Winona v. Wisconsin-Minnesota Light and Power Company,* 276 Fed., 996, the entire cost of financing claimed by the company was eliminated.

The court in its decision at page 1004 uses the following language which is peculiarly significant in the instant case:

> "I have eliminated entirely the item of cost of financing. Not but what such an item is proper in cases where the evidence shows such expense was incurred, but I have been unable to find any such evidence in the present record. There is evidence as to what the cost of financing would be in a reproduction of the present plant on the different bases proposed but, in my judgment, this is not enough. The reproduction method may theoretically call for such an item as cost of financing, but in making a reasonable valuation for rate-making purposes, I do not think that items which are theoretical only, so far as the case in hand is concerned, should have any place."

It is equally well settled in Ohio that cost of financing cannot be included in the rate base. *Portsmouth Gas Company v. Ohio Public Utilities Commission,* 119 O. S., 24, 32 (1928).

It seems peculiarly significant that the only decision of this court cited by counsel for appellant to sustain its contention for the inclusion of the item covering the cost of financing is *Ohio Valley Water Company v. Ben Avon Borough*, 253 U. S., 287, decided in 1920 prior to any of the decisions hereinbefore quoted and in which this court did not pass upon the merits of the valuation involved.

3. The Contention that the Court Erred in Disallowing the Cost of Cutting and Restoring Pavement Over Mains and Service Lines in the Valuation of Appellant's Property.

The exclusion of all costs for paving cut and replaced, other than that cut and replaced at the time of the original installation is so clearly established that it is not now open to dispute.

The appellant in its account for distribution line equipment claim the sum of $474,131.00. This account was reduced by appellee to $334,586.00, or a total reduction of $139,545.00. This entire reduction represents the cost of cutting and restoring paving over mains and service lines which was admittedly not in existence at the time of the original laying. (R., 354, 361.) In other words, the company now seeks in this case to secure a reversal of the universally accepted principle as laid down by this court in *Des Moines Gas Company v. Des Moines*, 238 U. S., 153, where this court approved the exclusion of an item of $140,000 for pavements which had not been disturbed in actual construction.

In *Valuation of Public Service Corporations*, (2d Ed.,

1928), by Robert H. Whitten and Delos F. Wilcox, it is said (p. 778):

> "The law seems to be settled against the inclusion of the cost of cutting and replacing pavement as a part of the rate base or as an element in just compensation, except to the extent that the utility has in fact been compelled to incur such an expense in the construction or reconstruction of its system."

The language of this court in *The Des Moines Gas Company v. City of Des Moines, supra,* is so clear that no room for doubt is left as to the propriety of the action of the appellee in disallowing the amount claimed for cutting and restoring pavement over mains and service lines where there was no evidence anywhere in the record to indicate that the utility had been compelled to incur such expense in the construction or reconstruction of its system.

Again it is significant that the only cases cited by appellant in connection with this item are *Regan v. Farmers Loan and Trust Company,* 154 U. S., 362, 410, (Appellant's Brief, p. 37), and *Willcox v. Consolidated Gas Company,* 212 U. S., 19, 52, (Appellant's Brief, p. 38), neither of which sustain the contention of the plaintiff and both of which were decided long before *Des Moines Gas Company v. City of Des Moines,* 238 U. S., 153. In what appears to be sheer desperation, appellant attempts to sustain its contention, first, upon the theory that such a cost has been allowed in condemnation cases and, second, upon an attempt to give a strained construction to the Ohio statute. (See 499-9, General Code, Subsection

G, Appendix.) As to this first contention, in the very authority relied upon by appellant, *Wichita Water Company v. Wichita*, 271 Fed., 973, 976, the court sustained the general rule disallowing this particular item distinguishing the Des Moines case in the following language:

> "Yet the question in that case was one of just rates of service to be charged the consumers of gas."

Certainly counsel for appellant does not contend that this is not a case which involves just rates of service to be charged consumers of gas.

In *Columbus Gas and Fuel Company v. City of Columbus*, 17 Fed. (2d), 630, at page 633, the court made the following statement:

> "The company contends that, under the reproduction new theory, the cost of cutting and replacing all pavement that, at the time of the appraisement, which had been constructed over the mains in the natural gas system, properly entered into the reproduction cost new. On the other hand, the city claims that only such pavement as was cut at the time of original installation should now be carried in that value. The master's finding is in accord with the city's contention, and is correct. Rate-making bodies have been confronted with this question, and the weight of these holdings is so strong that the exclusion of all costs for paving cut and replaced, other than that cut and replaced at the time of the original installation, has become the almost universal rule. Spurr, Principles of Public Service Regulation, Volume 2, c. 26; Des Moines Gas Company v. Des Moines, 238 U. S., 153, 171, 35 S. Ct., 811, 59 L. Ed., 1244."

A more decisive statement on this item can not be conceived and this statement is of even greater im-

portance when it is considered that the utility there involved was an Ohio utility subject to the same Ohio statute which appellant claims exempts the application of this rule which is almost universally applicable. Of even greater significance perhaps is the fact that in the Columbus Gas case, now pending before this court, (The Columbus Gas & Fuel Company, Appellant v. Public Utilities Commission of Ohio, and the City of Columbus, Ohio, October Term, 1933, No. 608), no allowance for this item is claimed by the company, such an allowance having been claimed before the appellee and the lower court but abandoned in this court. It should be remembered that there is no dispute over the dollar amounts as claimed by the appellant and as allowed by the appellee covering this item but simply over the principle involved. To sustain the contention of the appellant in this regard woudl require a reversal not only of the Ohio rule, but of the federal rule and the rule of this court as well.

4. The Contention that the Court Erred in Not Making Allowance in the Rate Base for Appellant's Going Concern Value.

Where evidence of reproduction cost new less depreciation, using current prices as of the date certain, plus liberal general overheads, working capital and materials and supplies is given due consideration in connection with other competent evidence in arriving at fair value, it is manifest that under the law, going concern value has been given all the consideration it deserves and no separate allowance therefor is necessary.

The appellant in its brief filed herein refers to its proved going concern value. This "proved going concern value" apparently rests upon the testimony of Witnesses F. H. Lerch, Jr. (R., 364), F. C. Hamilton (R., 389) and James A. Emery (R., 426). On the basis of the testimony of these witnesses the appellant claims the round sum of $125,000 for this item. One witness (Hamilton) estimated this item at from $14.00 (R., 423) to $10.00 (R., 426) per customer for the total of 14,019 customers. Another witness (Lerch) arrived at going concern value by taking 10% of the total property on a reproduction new basis. (R., 365, 366.) This graphically illustrates the theoretical nature of the testimony of the appellant's witnesses. The testimony of Witness Lerch is particularly intriguing. He first states (R., 365) that going concern is a very difficult matter to compute mathematically and says he has not attempted to do it in this case. He merely recites that in his opinion going con-

cern value in this case is a very substantial item of cost. He then proceeds to say that in accordance with the general practice of commissions and courts he had computed the going concern value of the property under consideration to be at least 10%. Upon further questioning he admits (R., 366) that he has arrived at his estimate of going concern value for a total of $125,000 by taking 14,000 consumers and multiplying these consumers by nine and a fraction dollars. He seems to overlook the fact that 14,000 consumers multiplied by nine and a fraction dollars would give him a greater amount than the total which he claims. Upon questioning by the appellee (R., 366), he next admits that his figure of $9.00 per customer is merely a conclusion and when pressed by the appellee (R., 371) as to why he has used 10% rather than some lesser per cent. he replies that he has used 10% for the same reason the courts and commissions have used that figure. Then when pressed by the appellee as to whether or not his testimony was not based upon the going concern value in connection with the particular property under consideration but rather upon his knowledge of what somebody else had said was the correct per cent., he repudiates all his former testimony and replies that it is based upon his own experience. Again when asked by the appellee (R., 371-372) as to why he had allowed 10% instead of 5% he simply stated that he thought that it was what should be allowed and then finally he admits (R., 381-382) that the $125,000 testified to by him as a proper element for going concern value was not his own conclusion at all, but was rather the

conclusion he had received from another witness. His testimony, therefore, becomes entirely valueless to the appellant but we believe it is of particular value to the appellee as illustrative of the unreliable quality of the testimony introduced by the appellant to sustain its claim for going concern value.

The testimony of the other two witnesses was not of much greater value. Mr. Emery, on whom counsel for appellant placed their chief reliance, prepared an exhibit identified as "Company Exhibit No. 7," to which the attention of this court is invited. It is founded on principles which were definitely rejected by a three-judge court in the case of *New York Telephone Company v. Prendergast*, 36 Fed. (2d), 54, wherein that court at page 64 of its decision made the following statement:

> "The master found that the plaintiff was entitled to the valuation as a going concern of $26,000,000 in the city of New York and $9,000,000 outside of the city. While the plaintiff is well managed and has built up a large business with a trained force of employees, who are found capable and expeditious in the discharge of its service to the public, still the allowance by the master was excessive. McCardle v. Indianapolis Water Co., 272 U. S., 400; Houston v. Southwestern Bell Tel. Co., 259 U. S., 318; Kings County Lighting Co. v. Prendergast (D. C.), 7 F. (2nd), 192; New York Tel. Co. v. Prendergast (D. C.), 300 F., 822.
>
> The commission, after the decision granting the injunction pendente lite by this court, allowed $10,000,000 for going value—$7,500,000 in the city of New York, and $2,500,000 outside the city. Some items which the master considered, we think improperly, led him to these conclusions. Plaintiff's claim, which the master considered, that $19,000,000

was required to train its force of employees to their present efficiency, had previously been treated as a cost of operation. That treatment was proper. It proved $5,500,000 for developing records, files, etc., and $4,000,000 for record of subscribers and directories. These expenses were charged up to operating costs. They may not be charged both as expense of operation and as an acquisition of capital. $9,500,000 was considered as the hypothetical cost of advertising and canvassing to get subscribers. This was a cost for creating good will and a regulated utility cannot estimate good will into its rate base. Galveston Elec. Co. v. Galveston, 258 U. S., 388. The claim of $9,500,000, consisting of items for maintenance, depreciation, interest, and taxes between completion of the hypothetically reconstructed plant and the time when it would be running at normal operating capacity, was found by the master to be too speculative. The allowance made by the commission for going concern value was soundly based, and therefore we modify the amount allowed by the master of $10,000,000."

Mr. Emery has divided his theoretical costs into two groups, with subdivisions in each. We quote one statement appearing at the top of page 16 of Exhibit No. 7 as follows:

"Though as an accounting matter, the above costs (referring to new business costs) may have been carried as operating expenses, the actual effect of so charging them was to decrease the net earnings and the resultant return to the stockholders, and as a consequence, these costs were thus really paid for by the stockholders of the company."

The fallacy of such reasoning is self-evident, and yet it dominates the entire exhibit. The appellant would have

us disregard the fact that trained employes are just as much physically in existence as of a date certain as the necessary materials such as pipes, etc. When such employes are hired, their degree of training is evidenced by their salary. Under the appellant's theory, they would capitalize the cost of such theoretical training, thus making the rate-payer pay a return on such amount, and then charge as operating expense the total amount of his salary.

As to the first group of hypothetical costs involving the so-called cost of attaching business and of attaching personnel, it is submitted that Exhibit No. 7 discredits itself.

The next item on which Mr. Emery seeks to create a value is termed the cost of adjusting physical property. In other words, after we have literally reconstructed the existing plant just as it is, he desires to have us assume that there would be a certain amount of "trying out" and adjusting to produce the most satisfactory degree of service. Again they seek to capitalize something which has been paid for as an operating expense or else is non-existent.

The last item to which he attributes a value, he terms unification value. In substance, he says (Exhibit No. 7, page 27), that considering the fact that the present Dayton Power and Light Company is a consolidation of separately operating systems, he believes the unified system has an added element of intangible value of not less than $250,000.00, one-seventh of which he allocates to the towns involved in this proceeding. This is the last

step in the repetition of building up so-called values, none of which appear on the books of the appellant in its capital account. For good measure, he refers to a value of developed and potential business, to which he assigns no definite value. On such testimony as that, they now ask this court to add to the appellee's value, the sum of $125,000.00.

An examination of the record will show clearly how the appellee sought to ascertain the clerical costs of adding the present existing subscribers to the theoretically reconstructed lines of the appellant, but without success. It is submitted that the burden of proving going concern value rests on the appellant, and that the character of the testimony of the appellant's witnesses on this point required the appellee to disregard it.

Counsel for appellant has heretofore called the attention of this court to the Ohio statutes dealing with the question of valuation. The valuation formula prescribed by the Legislature of the state of Ohio does not permit an inclusion of a separate allowance for going concern value in the determination of fair value for rate fixing purposes. (Ohio G. C., 499-8, 499-9, 614-46; *Columbus Gas & Fuel Co. v. Public Utilities Commission*, 127 O. S., 109, 187 N. E., 7, P. U. R., 1933D, 238.) But laying to one side this controlling consideration, it is clear that where fair value is fixed upon evidence such as was before the appellee, no additional separate allowance for going concern value is admissible as a matter of law and that, were this not so as it is, the appellant has wholly failed to sustain the burden of establishing any separate

element of going concern value by evidence either competent or of probative value. The law is well settled, both under the decisions of the Supreme Court of Ohio and of the Supreme Court of the United States, that where the property of a utility is valued, not as junk or property lacking utility, but as a going plant in successful operation, the element of going value has been given all the consideration which it deserves, and no additional separate allowance for going concern value is permissible. *Cincinnati & Suburban Bell Telephone Co. v. Public Utilities Commission*, 113 O. S., 259; *The Hardin-Wyandot Lighting Co. v. Public Utilities Commission*, 118 O. S., 592, 603; *Portsmouth Gas Co. v. Public Utilities Commission*, 119 O. S., 24; *Columbus Gas & Fuel Co. v. Public Utilities Commission*, 127 O. S., 109, P. U. R., 1933D, 238, 247-8; *City of Houston v. Southwestern Bell Telephone Co.*, 259 U. S., 318; *Galveston Electric Co. v. Galveston*, 258 U. S., 388; *Des Moines Gas Co. v. City of Des Moines*, 238 U. S., 153. Indeed it is a matter of record that every valuation made by the appellee since 1917, which included a separate allowance for going concern value has been appealed to the Ohio Supreme Court and that the latter tribunal has without exception struck out every such allowance; and it is also a matter of record that no valuation made by appellee which omitted such an allowance has ever been declared invalid on appeal to the Ohio Supreme Court because of the absence of such an allowance. Where evidence of reproduction cost new less depreciation, using current prices as of the date certain, plus liberal general overheads, working capital

and materials and supplies is given due consideration in connection with other competent evidence in arriving at fair value, it is manifest that under the law, as stated by the foregoing authorities, going concern value has been given all the consideration it deserves. The basic fallacy in the appellant's position is that it attempts to add a separate allowance for going concern value not to evidence of fair value of property considered as junk, disconnected units or without business attached, without earnings or prospects of earnings but to a fair value for a plant in full operation with customers attached and earning money. It must be manifest to the most naive that if the plant of the appellant or any plant were valued as junk, or as property unassembled, or as property without customers attached, without established business, and without earnings, such a value would inevitably be only a fraction of the reproduction cost new less accrued depreciation as estimated in this and ordinary utility rate cases. Manifestly, such a plant would be so lacking in utility that not even the most ardent representative of utility interests could contend that its fair value was anything approaching reproduction cost new of the physical property plus general overheads, material and supplies, and working capital. The fact manifestly is that where due consideration is given to reproduction cost new at current prices, less accrued depreciation, plus general overheads, material and supplies, and working capital, in connection with any other competent testimony, in arriving at the fair present value for rate making purposes, that utility property has been valued as a going

concern with every element of going concern value given all the weight that it deserves, and that no separate and additional allowance for going concern value may be made without a manifest duplication. That unquestionably is the reason why the statutes of Ohio provide, as one element to be found and considered by the commission, the reproduction cost new less accrued depreciation and do not provide for or permit any separate additional allowance for so-called going concern value.

While it is thus manifest that no separate allowance for going concern value could be sustained in addition to that which is reflected by the evidence in this case of reproduction cost new plus general overheads, were that not so as it is, the appellant would wholly fail to sustain the burden of proof which rests upon it by evidence either competent or of probative value in support of its claim of a separate allowance for going concern value.

Not a single capital expenditure is cited for an additional and separate allowance for going concern value but rather the entire claim of the appellant was predicated upon the testimony of the three witnesses hereinbefore referred to which was wholly speculative and conjectural and was properly disallowed by the appellee.

Los Angeles Gas & Electric Corp. v. Railroad Commission of California, 289 U. S. 287, 77 L. Ed., 1180, 53 S. Ct., 637.

5. The Contention that the Court Erred in Reducing Appellant's Undistributed Construction Expenditures From $130,640.00 to $99,045.00.

In the absence of any evidence as to the actual amount of general overheads on undistributed construction expenditures experienced by appellant and where no evidence is introduced to show that any of such costs have been capitalized on its books it was not error on the part of appellee and the court below to reduce the claim of appellant for this item from 17% to 14% particularly when appellant's claim was based on purely speculative and conjectural testimony.

It is the contention of the appellant that the appellee disregarded the evidence on this subject when it used 14 per cent. of the value of the physical property as found by it as a proper allowance for this item.

This amount allowed by the appellee was the same as that allowed The Ohio Fuel Gas Company in the Columbus case and was more than the allowance made in The Columbus Gas and Fuel Company case. This allowance was approved by the Supreme Court of Ohi in its decision. (127 O. S., 141; R., 58.)

The testimony which appellant claims that the appellee disregarded in making this allowance for undistributed construction expenditures, or general overheads, is found in the record at pages 458 to 474, inclusive, where Witnesses F. H. Lerch, Jr., F. C. Hamilton and Frank Parker testified that in a theoretical reconstruction of a public utility property, an allowance in the neighborhood of 17

per. cent. for general overheads, or undistributed construction expenditures, should be made.

If we follow the argument of appellant correctly, it would seem that appellee is bound to accept these guesses made by appellant's witnesses. In so far as we are able to discover, no evidence was introduced to the effect that any of these costs had been capitalized on the books of the company or that there was any experience on the part of this company that the general overheads, or undistributed construction expenditures, aggregated 17 per cent.

The purely conjectural nature of the testimony of appellant's witnesses is again well illustrated by Witness Lerch who, in reply to questions from the appellee, stated in substance that his allowance for this item was based upon general usage and custom. (R., 466.)

Appellant, in its brief, apparently adopts the same theory when, to sustain its contention, it cites a number of cases approving allowances approximating 17 per cent. for this particular item.

We do not believe there is any particular value in citations of what some other courts and some other commissions may have allowed for this item in cases before them, but if there were we might make mention of the fact that the Supreme Court of Ohio in numerous cases has sustained an allowance by the appellee of 7 per cent. for general overheads which is just one-half of the amount allowed in this case. *Hardin-Wyandot Lighting Company v. Public Utilities Commission,* 118 O. S., 592, 610; *Portsmouth Gas Company v. Public Utilities Com-*

mission of Ohio, 119 O. S., 24, 31; *Logan Gas Company v. Public Utilities Commission of Ohio*, 121 O. S., 507, 510.

It should be remembered that the allowance for this item is purely a judgment allowance, and we are of the opinion that the appellee was entirely justified in making an allowance of 14 per cent., and that such an allowance is more than ample.

The unreliability of reproduction cost estimate of overheads is well illustrated in *The United Fuel Gas Company v. Public Service Commission of West Virginia*, 14 Fed. (2d), 209, P. U. R., 1927A, 707 (1926) (affirmed by the Supreme Court of the United States, 278 U. S., 322), at page 214, where Judge Rose, speaking for the majority, said:

> "* * * There is no possible question that in almost all of these rate cases the overhead charges included in the estimated cost of reproduction greatly exceed any sum that the utility actually paid out for such purposes. A large and widely distributed plant is ordinarily a growth extending over many years. Its property is managed by its officers, and its construction is financed in installments. *The large overheads estimated by the experts are simply not incurred.* * * *" (Italics ours.)

6. The Contention that the Court Erred in Reducing Appellant's Claim for Working Capital From $82,200.00 to $61,880.00.

The amount to be allowed for working capital is a matter of judgment depending upon the circumstances in each case. Upon the basis of the evidence in this case and in the light of all the circumstances the amount allowed by appellee and affirmed by the court below was ample.

The fairness of the appellee's allowance for this item is not open to serious dispute. The precise manner in which the allowance for working capital was arrived at by the appellee is contained in its order. (R., 224.)

One and one-half month's operating expense, excluding gas purchased and depreciation allowance, was first allowed in the amount of $17,107.00, which, if we read the record correctly, is the amount testified to by F. C. Hamilton, one of the appellant's two witnesses on this subject. Then, one month's gas purchase was allowed in the amount of $38,755.00, and material and supplies, as claimed by the appellee, in the amount of $5218.00 (R., 454) were allowed.

These amounts total the allowance made by the appellee. The only difference between that and the appellant's claimed amount is that they seek operating expenses for two months plus $10,000.00 cash, which of course is wholly unwarranted, inasmuch as their bills are payable monthly and if they have a sufficient allowance for every operating expense for one month and a

half, they do not need and are not entitled to any additional cash allowance.

The appellant, in its very brief discussion of this matter (Appellant's Brief, page 51), cites *Vincennes Water Supply Company v. Public Service Commission*, 34 F. (2d), 5, 8, as authority for the allowance of some amount for working capital.

There is no dispute between appellant and appellee that some amount should be allowed for working capital. The only point of difference is the amount that should be allowed for this item.

We respectfully submit that the amount allowed by appellee for working capital was entirely fair and reasonable.

In conclusion, reference should again be made to the largely conjectural nature of the testimony of the appellant's witnesses as to this item, as illustrated by the testimony of Witness Lerch. (R., 456, 457.)

II.

APPELLANT'S OPERATING EXPENSES.

The difference in operating expenses as claimed by appellant and as allowed by appellee is $104,198.00.

The items comprising this difference are set forth at page 7, supra. Of the total difference, $71,547.00 results from the finding of the appellee that 39 cents per M c. f. is an adequate gate price for gas purchased by the appellant in lieu of the 45 cents per M c. f. claimed by appellant under the contract with its affiliate, The Ohio Fuel Gas Company.

$30,200.00 results from the reduction in the annual allowance for depreciation made by appellee under the amount claimed by the appellant. These two items total $101,747.00, or all but $2451.00 of the difference in the amount claimed by the appellant and the amount allowed by appellee for operating expenses.

The appellee also reduced the general administrative expenses claimed by the appellant to $5963.00 and increased certain tax allowances by approximately $7750.00. The appellant apparently does not complain as to the reduction in general administrative expenses which was occasioned by a reduction made by appellee in the service fee paid to The Columbia Engineering and Management Corporation, another wholly owned subsidiary in the Columbia system. Appellant paid $13,731.00 to The Columbia Engineering and Management Corporation in 1929 and the appellee allowed $7778.00. This reduction rests entirely on the evidence and the record made in the Columbus Gas case, the appellee having found that 56.6 of the management fees was justified on the basis of the value received.

As has been indicated, appellant does not urge this matter in its brief and we make only this passing reference to it.

Appellant opens its discussion of operating expenses at page 53 of its brief (Appellant's Brief, page 53), and in the closing paragraph on this page states that the appellee and the court below took no notice of an increase in excise taxes of 1% in the state of Ohio enacted by the Ohio Legislature in 1932, and which they contend would

result in an increase in their taxes of $7416.22. This contention raised by the appellant, is, of course, erroneous. The appellee found that the appellant had earned a return of 6½% as of 1929 and that this return was a fair return on its investment, but the appellee made no such finding for 1932. Appellee made every tax allowance credit according to law for 1929 and there is nothing in the record of this case to show the revenues and expenses of this appellant for the succeeding years allocated to this area. It would be absurd, therefore, to give effect in a 1929 rate study to a 1932 enactment of the Legislature.

In determining the excise tax, the appellee took 1.35% of $678,778.00, being the amount it found necessary for a 6½% return to the appellant, whereas the appellant's excise tax was calculated on $679,444.00. The difference in this regard is $9.00. In estimating the Public Utilities Commission tax assessed under Section 606 (Appendix) of the General Code of Ohio, the appellee used the 1929 percentage, whereas the appellant used the 1928 percentage. This percentage varies from time to time because of the method in which the tax is assessed. The difference of $56.00 in favor of the appellant is negligible.

As to federal income tax, the appellant, in its set-up showed a greater operating expense than its operating revenues. This was due, of course, to the three items, gas purchased for resale at 45 cents per M c. f., annual depreciation allowance, and service fees to the Columbia Engineering and Management Corporation. The appellee, in adjusting these expenses, showed an operating

profit, necessitating the allowance of $7697.00 for federal income tax, which amount was allowed as a further operating expense.

With further reference to the increase in the excise tax, which became effective in 1932, and which has been heretofore discussed, the appellant claims that under its present rates now being collected under bond, it would have to pay to the state out of its receipts for 1932, the amount of $7416.00 because of this extra tax and that under the old rates, this amount would be $6794.00. Without questioning the amounts it is obvious that they can only be related to the 1932 revenues and expenses of the appellant which are not in this record. Whether or not this additional tax would deprive the appellant of a fair rate of return, would depend entirely upon what that is determined to be.

The real differences between appellant and appellee, however, in so far as operating expenses are concerned, are confined to the items of (1) annual depreciation and (2) cost of gas purchased, which aggregate $101,747.00 of the $104,198.00 difference in the amounts claimed by the appellant and the amounts allowed by appellee for such expenses.

1. The Annual Depreciation Allowed by Appellee Is Ample and Sufficient and Represents the Actual Percentage Used by the Appellant for This Item.

The appellant contends (Appellant's Brief, p. 54) that the judgment of the court below in affirming the order of the appellee fixing the annual depreciation allowed appellant takes its property without due process of law contrary to the Fourteenth Amendment.

To support this contention, appellant recites that "the proof showed $43,981.00 as necessary for appellant's annual depreciation requirements for its property in the towns." The "proof" upon which it relies is found in an exhibit introduced by the appellant (Exhibit 8, R., 581). Presumably, this evidence which appellant refers to as being "uncontradicted" is supposed to represent 4% of the total depreciable property. As a matter of fact, this was simply another attempt to show a higher operating cost than the appellant actually sustained. Page sixteen of Exhibit 8 (R., 581) contains a summary of actual operating revenues and expenses of the appellant allocated to the territory involved. This cannot be said of the item for depreciation however. That represents a purely theoretical figure and is not taken from the books of the appellant. It should be remembered that the appellee in determining this case has not questioned the allocations made by the appellant either of plant or operating expenses, but has accepted them exactly as presented. Appellant did not, however, choose

to submit its actual book entries showing the amount actually set over to the depreciation reserve account allocated to this territory, but relied on the representations of Ford, Bacon and Davis that an amount equal to 4% of total depreciable property new should be set over into the depreciation reserve account.

The actual practice of this appellant, as shown by its annual reports filed with the appellee each year as required by law is to set up for their depreciation reserve account 2% of the property value (book) of their gas division. The fairness of such an allowance is fully sustained by the record in the Columbus case. The purpose of a depreciation reserve account is to enable the appellant to make itself whole when it retires certain old plant from time to time. It is just as much an accounting problem as it is an engineering problem and the Interstate Commerce Commission has taken full cognizance of that fact in its latest order relating to depreciation allowances for telephone companies (Interstate Commerce Commission Order No. 14,700). For the appellant to set up its experienced operating costs in every particular excepting depreciation reserve allowance, and then resort to a hypothetical percentage furnished by Ford, Bacon and Davis, twice as large as it is actually using, would seem to be entirely unwarranted. The allowance made by the appellee in the sum of $13,721.00 representing 2% of the total depreciable plant of the appellant allocated to this territory is ample and sufficient and should be sustained, particularly as it represents the percentage used by the appellant.

Appellant's discussion of this subject is meager, (Appellant's Brief, pp. 54, 55.) It recites that Section 614-23 of the General Code of Ohio provides that the rates of a utility shall be sufficient "to the necessity of making reservation out of the income for surplus, depreciation and contingencies, and all such other matters as may be proper." It is difficult, however, to determine just how the provisions of this statute assist appellant in this instance. Of course, reservations should be made for annual depreciation, but the question here presented is concerned with the amount of such allowance. The appellant claims 4% of its depreciable plant. The appellee allowed 2%. *The 2% represents the actual percentage used by the appellant under which percentage for annual depreciation it has been able to maintain, in its own language, "a well established utility, furnishing a necessary service, * * * operated upon a high efficiency basis,"* (Appellant's Brief, p. 41) and the recital of what some other commissions have allowed for this item is of little value in the face of appellant's actual practice and actual experience.

2. Cost of Gas Purchased.

Appellant initiates its discussion of this subject with the following statement: "Appellee and the court below erred in disregarding the contracts between appellant and The Ohio Fuel Gas Company and in allowing appellant to include in its operating expenses only 39 cents per thousand for said gas instead of the contract price of 45 cents." (Appellant's Brief, p. 55.)

Further on the same page appellant states: "Appellee's order was based on two theories, (1) because the parties were affiliated corporations the contracts should be disregarded and (2) such contracts being disregarded, the only way to prove the reasonableness of the city gate price was to prove the cost of gas to the Ohio company." (Appellant's Brief, p. 55.)

Certainly the appellant is not quarreling with these theories, for it must be familiar (though it fails to cite the case) with the decision of this court in *Western Distributing Company v. Public Service Commission of the State of Kansas, et al.*, 285 U. S., 119, 76 L. Ed., 655, 52 S. Ct., 283, wherein this court held in paragraph 4 of the syllabus as follows:

> "A state public utilities commission may properly require a natural gas distributing company seeking an increase of rates to show the fairness and reasonableness of the rate paid by it to the pipe line company from which it obtains its supply, where both companies are subsidiaries of a third, although this may involve a presentation of evidence as to the property and business of the pipe line company which would not be required in the case of parties dealing at arm's length and in the general and open market, subject to the usual safeguards of bargaining and competition."

As a matter of fact, the foregoing decision of this court, rendered on the twenty-ninth day of February, 1932, is almost identical, in so far as its facts are concerned, with this case, for in that case, in paragraph 1 of the syllabus it was held that:

> "A local natural gas distributing company making application to a state public utilities commission

for an increase of rates is bound to show that the price paid for gas obtained from a pipe line company is fair and reasonable, although the interstate character of the pipe line company precludes state regulation of its rates, where both companies are subsidiaries of a third company."

Applying the reasoning of the foregoing statement of this court to this case, we find that here is an application by appellant, a local distributing company of natural gas, for an increase in rates; that it purchases its gas from a pipe line company and that both it and the pipe line company are subsidiaries of a third company.

Continuing its argument, appellant (Appellant's Brief, p. 56) claims "that the price specified in said contracts is fair and reasonable being the going market price of gas in like quantities and under like conditions, and the best price that could have been obtained by appellant from any source." Again appellant appears to be in entire ignorance of this court's decision in *Western Distributing Company v. Public Service Commission of the State of Kansas,* supra, wherein in paragraphs 2 and 3 of the syllabus, this court held as follows:

"2. A prima facie case for the fairness and reasonableness of the rate charged for natural gas by a pipe line company to a distributing company is not made by showing that courts have held a like charge to other distributing companies in the state to be reasonable.

"3. A prima facie case for the fairness and reasonableness of the rate charged for natural gas by a pipe line company to a distributing company is not established by uncontroverted averments in a

> complaint in a suit by the distributor to enjoin further enforcement of a public utilities commission rate order and interference by the commission with the charging of reasonable rates, that such wholesaler is its only source of supply, that no supply at a lower price can be obtained from any other source, that the same rate is being charged by the wholesaler to other distributing companies, and by another independent wholesaler to another city, and that an ineffectual effort has been made to develop a local supply of gas and to obtain a lower rate from the wholesaler, where the distributor and wholesaler are both subsidiaries of the same company."

The appellant seems likewise to be uninformed of the decision of this court in the case of *Smith v. Illinois Bell Telephone Company*, 282 U. S., 133, 75 L. Ed., 255, 51 S. Ct., 65, by virtue of which there can be no question about not only the propriety but the duty of this appellee to ascertain a fair city gate price in the instant case.

Appellant attempts (Appellant's Brief, p. 56) to distinguish this case from other cases in which a similar question has arisen in the following particulars and alleges that:

> "1. There are no common officers and only one common director of The Ohio company and appellant."

This may be correct, but appellant does not deny that both the Ohio company and appellant are wholly owned, so far as their common stock is concerned, by the parent company, The Columbia Gas and Electric Corporation, (R., 222) and the language of the Supreme Court of Ohio, in the opening paragraph of its opinion in the

Columbus case *(The Columbus Gas and Fuel Company v. The Public Utilities Commission of Ohio and the City of Columbus,* 127 O. S., 109, R., 82) wherein the court said: "The outstanding fact which must first be stated as underlying and conditioning every element involved in this controversy is as stated in the 1931 annual report of The Columbia Gas and Electric Corporation that all the properties involved in this case are 'thoroughly integrated and interconnected, they constitute a single operating unit,'" is equally applicable in the instant case.

And that

> "2. The appellee in its finding of November 21, 1930, expressly held 'we do not hold the contract between the producing and distributing company void or a sham or fraudulent.'" (R., 134.) The appellant, in all fairness might have concluded this sentence, the conclusion being as follows: "But we take the position that at this time it is incumbent upon the company to produce all available evidence within its control touching the fairness of the gateway rate."

The attempt of appellant to establish as a principle of law the fact that appellee was not entitled to inquire as to the reasonableness of the gate price for gas charged the appellant by its affiliated company, The Ohio Fuel Gas Company, and that the appellee was not entitled to go back of the contract to determine the reasonableness thereof, is so obviously erroneous as to merit but little consideration.

To sustain its contention, it cites but one decision of

this court (*United Fuel Gas Company v. Railroad Commission of Kentucky*, 278 U. S., 300), which, as a matter of fact, does not sustain its position and it neglects to cite the much more recent decisions of this court in *Western Distributing Company v. Public Service Commission of the State of Kansas*, supra, and *Smith v. Illinois Bell Telephone Company*, supra, both of which decisions absolutely refute its contentions.

Appellant (Appellant's Brief, p. 259) insist that it has established the fairness of its 45 cent gate price by "uncontradicted testimony." Unfortunately, we are again unable to agree with the appellant in this contention. We have repeated so often that it has become wearisome, the statement that there was ample evidence in the record of the Columbus Gas case which was incorporated into this case by stipulation, to establish that 45 cents per M c. f. was an excessive price at the city gate, and that 39 cents per M c. f. as allowed by the appellee was more than ample.

In this connection, it should be remembered that the appellee by a majority opinion, found 39 cents per M c. f. to be a proper gate price in the Columbus case (Columbus Gas Case No. 5935, R., 167), and adopted it as a uniform gate price for the Ohio company. The whole matter is covered so thoroughly in the briefs filed in behalf of the city of Columbus in this case (The Columbus Gas and Fuel Company v. The Public Utilities Commission of Ohio and the City of Columbus, October Term, 1933, No. 608, now pending in this court), that it is not necessary to discuss it at length here.

The minority opinion of the appellee in the Columbus case, supra, found 31.7 cents per M c. f. as a proper price. (R., 204.) The appellant contends that it should be not less than 45 cents per M c. f.

The appellee did not in any way seek to impair the contract between the appellant and The Ohio Fuel Gas Company, but it did seek to ascertain the fair gate price in order that it might determine the fair operating expenses of the appellant. It is obvious, therefore, that if 39 cents per M c. f. be found to be a fair city gate price, the appellee's allowance in this case for the cost of gas purchased must be affirmed. And in view of the fact that the Supreme Court of Ohio in The Columbus Gas and Fuel Company case found that a gate price of 31.7 cents or even lower would be fair, we believe that it is fairly conclusive that an allowance of 39 cents per M c. f. would not result in confiscation of appellant's property.

The Relationship Between This Case and the Columbus Gas Case (Columbus Gas & Fuel Company, Appellant v. Public Utilities Commission of Ohio, and the City of Columbus, Ohio, October Term, 1933, No. 608) in So Far as the Cost of Gas Purchased Is Concerned.

In the effort to justify its 45¢ per M c. f. contract price for gas at the city gates the appellant devotes a very considerable portion of its argument (Appellant's Brief, pp. 61-119, inclusive) to that portion of the case relating to the determination of the costs entering into the ascertainment of a fair and just gateway price.

This evidence as to such costs was brought into this case by stipulating that portion of the record in the Columbus Gas case (now before this court for review—The Columbus Gas & Fuel Company v. The Public Utilities Commission of Ohio and the City of Columbus, Ohio, October Term, 1933, No. 608) applicable thereto so that the determination of a proper gateway price for gas in this case turns upon the same evidence that is before this court in the Columbus Gas case. (The Columbus Gas & Fuel Company, Appellant v. The Public Utilities Commission of Ohio, and the City of Columbus, Ohio, October Term, 1933, No. 608.)

The appellee in its decision (both majority and minority) established a system wide gate price for gas sold by The Ohio Fuel Gas Company to its subsidiaries such as appellant in this case and The Columbus Gas & Fuel Company in the Columbus case. (Majority Opinion, R., 164, 176; Minority Opinion, R., 192, 214.) This was the position taken by the appellant (R., 164, 191, 192) who very definitely and positively stated at the very outset of the Columbus case that it would not attempt to make allocations to any particular community. (R., Columbus case, 1778, 1779.) The city of Columbus in the Columbus Gas case insisted upon allocation and the court below sustained the city's position in its decision. (Columbus case, R., 66, 69.) This contention was not urged in this case, however, and inasmuch as the system wide gate price of 39¢ per M c. f. allowed by the appellee was in excess of the allocated price approved by the court in the

Columbus case (not to exceed 31.7¢ per M c. f.) and even on the basis of such an allowance (39¢ per M c. f.) it was found that the appellant's application for increased rates was not justified. In other words, the appellee found a system wide gate price for The Ohio Fuel Gas Company of 39¢ per M c. f. (R., 176; Minority Opinion, 31.7¢, R., 214.) The court below held that the amount allowed by the minority of 31.7¢ per M c. f. was ample. This amount was almost 20% less than that allowed appellant by appellee in this case. Consequently, it is obvious that the amount allowed appellant by appellee in this case for cost of gas purchased at the city gates exceeds the amount allowed by the court below in the Columbus case for this same item allocated to Columbus by approximately 20%. That being so there was no necessity to determine the exact allocation in this case for on the basis of the most liberal allowance that could be made to it appellant had failed to justify its increased rates, and, further, the appellant had insisted that no allocation should be made and that position was accepted by appellee in this case. It follows therefore that if the system-wide gate price allowed by appellee of 39¢ per M c. f. was correct that appellant's case must fail and that if 31.7¢ per M c. f. found by the corut below in the Columbus case is correct then appellant is earning an even greater return than was anticipated by appellee by a very considerable margin for by no stretch of the imagination can it be contended that the gate price of gas at the city gates in this case would exceed the costs of gas at the city gates of Columbus by the difference between 39¢ and 31.7¢ or 7.3¢.

3. Gas Well Construction and Equipment Depreciation —The Ohio Fuel Gas Company.

Under sub-heading 3 at page 61 of its brief (Appellant's Brief, page 61) appellant complains of the fixing of the value of gas well construction (Account No. 211) and gas well equipment (Account No. 212) of Ohio Fuel by deducting from the reprodution cost of said property an amount for depreciation based upon the percentage of decline in rock pressure of existing gas wells.

This matter is so thoroughly treated in the brief filed in behalf of the city of Columbus in the case of The Columbus Gas & Fuel Company v. The Public Utilities Commission of Ohio and the City of Columbus, Ohio, October Term 1933, No. 608, at pages 178 to 187, inclusive, that its discussion of the matter is included here almost in its entirety. This discussion follows:

"No mention of the United is made in this connection because the method employed by the commission, and not disturbed by the court, is the same as that adopted by the commission and court in the United case, the record of which proceeding is a part of the record in this case, and the method is also the same as was employed for construction by the Columbus company's own engineers of their own volition in that litigation.

The Columbus company's engineers, Ford, Bacon and Davis of New York, determined the depreciation of these accounts in this case by partial inspection and observation, while Blundon, city engineer, based his depreciа-

tions upon the gas well's decrease in rock pressure just as was done in the United case.

The most interesting part of the discussion of counsel for the company is their justification for depreciating the well itself, that is, "the hole in the ground," by observation rather than by the depletion of gas, when obviously even the utility experts cannot view that hole.

All of the commissioners accepted the city's depreciations and refused to follow the Columbus company and its experts. The majority opinion merely accepts the city's depreciations, but Commissioner Bricker said this in his opinion:

> "Mr. Blundon's depreciation figure of gas wells was based upon the commonly accepted practice among engineers of determining the per cent. condition from the rock pressure showing at the initial flow and at the time of the appraisal. This is the method used by Ford, Bacon and Davis, the company's appraisers in this case, in the United Fuel case and was the method under which Ford, Bacon and Davis were proceeding in the Ohio Fuel Gas case until, according to the testimony of Mr. Weymouth, he convinced them that a different method should be used, which would bring about a higher per cent. condition and therefore a higher valuation.
>
> Considering that Mr. Weymouth further testified that he favored another method of depreciation, even giving a higher valuation than that given by Ford, Bacon and Davis and the fact that the rock pressure method is an old-established one used in determining depreciation of gas wells and that it has been adopted heretofore by Ford, Bacon and Davis, I accept the rock pressure method as used by Mr. Blundon and apply the same to the valuation of the gas wells fixed by the commission." (R., 202, 203.)

The depreciation of gas wells involves two accounts, the gas well construction account and the gas well equipment account.

The gas well construction account relates to "the hole in the ground," while the gas well equipment account includes the material involved in the equipment of the well, primarily the casing and the tubing.

Lerch, of Ford, Bacon and Davis, was in charge of the depreciation of the Ohio Fuel gas wells, and Antonelli was his field representative.

A glance at the testimony of witnesses for the Columbus Company and the story of Lerch and Antonelli as to why they switched from their own well tried methods afforded abundant proof that the principle applied and the result presented by the appellant in the depreciation of these accounts is the desire of Columbia System officials and not the independent judgment of unfettered appraisal engineers.

On cross-examination Antonelli testified that in depreciating the gas wells in the recent United Fuel Gas Company case in West Virginia, Ford, Bacon and Davis used the gas depletion method for gas well construction, (R., 1500), and that he had assisted in the inventory and appraisement of The East Ohio Gas Company and The Hope Company as of December 31, 1929, involving a natural gas rate for the city of Cleveland, Ohio, where the utilities are Standard Oil companies, and that Ford, Bacon and Davis engineers there also depreciated the gas wells by the depletion method. (R., 1499.) He further testified that he started to depreciate the Ohio Fuel

gas wells by using the very same method that Ford, Bacon and Davis had used in the West Virginia case and were then continuing to use in the East Ohio case, (R., 1501, 1502), that he was getting the initial and final pressure for each active well when the appraisal engineers were "required" by the gas company to desist from the rock pressure decline method. He also said that they were asked by those for whom they were making the appraisal to make only a physical examination of the property. (R., 1497, 1500, 1501.) Concerning the difference in results from the use of the two methods he stated that depreciation on the depletion method in the East Ohio case amounted to about 50 per cent. while the average physical deterioriation found under the so-called inspection method which Ford, Bacon and Davis were here directed to employ produced a depreciation of only 20 per cent. in Accounts 211 and 212. (R., 1504.)

Lerch, who was the chief representative of Ford, Bacon and Davis, in making the Ohio Fuel appraisal, also testified that Antonelli had started to compile the records of the decline in rock pressure of all the existing wells but that he (Lerch) had agreed to the discontinuance of the method. (R., 1531, 1532.)

How far this work proceeded in depreciating Ohio Fuel gas wells is not clear. The city called for the working sheets and persistently tried to ascertain the point to which that work had proceeded. But all our efforts were resisted. The reason is an open book. Lerch said that the condition of gas well construction and equipment found in the United case was 50 per cent. or a little bet-

ter. (R., 1533, 1534.) He admitted that he did not know how to explain the use by Ford, Bacon and Davis of two methods of depreciating gas wells at the same time. (R., 1535, 1536.) He further stated that the depletion method had been developed far enough in the Ohio Fuel case to show that they were going to get a lower valuation than was obtained in the method used. He was then asked this question:

> "Q. Well, I thought that among you representative gas utility men there was nothing more settled in your minds than the theory that you could, with all approximate fairness, determine the life of a well by the history of its rock pressure up to date?"

and his answer was:

> "A. I think you are perfectly right; I do not think anything has happened to change that." (R., 1538, 1539.)

Evidently the engineer, under orders from the Columbia System, had changed his method but had not changed his mind.

Lerch had testified at length in the United case, the record of which is included herein, and, upon cross-examination, was questioned as follows:

> "Q. Mr. Lerch, when you were examined on May 7, 1929, in respect to the depreciation of gas wells, (in the United case in West Virginia) I am advised that these questions and answers were made and given. There may be some slight errors, due to transmission, but let me read them:
>
> 'Q. Now, in that way you got the value of the wells new. How did you ascertain what the present value of the wells was, the depreciated value? A. Well, we have been talking only about the one

account, the gas well construction account. The cost of drilling wells we have assumed in this report the same as in the previous report and the same as we have done in practically all cases of valuing natural gas properties, that the gas well construction account was in the same deteriorated or depleted condition as the remaining rock pressure; in other words, we tabulated the rock pressure of the present wells and averaged the present rock pressure, and compared that with the original rock pressure of these identical wells, and found the wells had a remaining rock pressure of 46 per cent., and we have deducted therefore 54 per cent. of the new value as representing the amount of deterioration in the gas well construction account.'" (R., 1543, 1544.)

He commented that the quotation was substantially correct. (R., 1545.)

Whoever reads Lerch's testimony in the United case will find no occasion thereafter to question Blundon's basic reasoning in respect to the depreciation of gas wells.

It was finally developed, upon cross-examination, that Weymouth, of The Columbia Engineering and Management Corporation, was the Columbia System official who claimed to have "finally convinced" Ford, Bacon and Davis to use the new method. He said he explained his principles of depreciation to them and that they were a little hard to win over but he convinced them. (R., 1630-1633.) And what are Weymouth's principles of depreciation? For his frank confession we need only read his testimony, (R., 1636), where he reveals that he believes property should go into a rate base at cost new without

depreciation. He would hold property and equipment at 100 per cent. condition until it is absolutely abandoned. This is a golden dream of certain utility engineers which commissions and courts still reject.

Now whom shall we believe or follow: Philip drunk? Or Philip sober? Ford, Bacon and Davis using their best judgment in the United case, apparently unrestrained by orders from above, and Ford, Bacon and Davis in the East Ohio case, or Ford, Bacon and Davis starting in Ohio Fuel with their own old methods but, after sitting down across the table with Weymouth, the Columbia System spokesman, being "finally convinced" * * * "that the method used in West Virginia was wrong * * *"? Weymouth used the wrong word. He did not convince them. Antonelli says that he was "directed" to change the method. (R., 1500.)

The physical condition of the tubing and casing in the wells was determined by observation. Of course the observation was not based upon an inspection of the material in the wells, for that was hidden, but upon an inspection of casing and tubing that had been taken from recently abandoned wells. When the average per cent. condition of the recently pulled tubing and casing from other wells had thus been determined, that per cent. was assigned as the condition of both the equipment and the existing wells and also to gas well construction, the hole in the ground. (R., 1497.)

We say in passing that there is no possible connection between the per cent. material condition of the equipment in the well and the worth of the mere hole in the

ground. Surely, whatever method may be used for depreciating the gas well equipment, the hole in the ground loses all value the moment the gas well is abandoned through depletion or otherwise.

A gas well is drilled and equipped for the purpose of producing gas from the underlying sands and obviously is of little use or value when that purpose has been fulfilled or when that purpose has been terminated. The usefulness and the life of a well are measured by the proportion of gas which it has produced and by the proportion it will still produce. The hole in the ground is of no value or profit after it has ceased to produce gas in paying quantities. Indeed it then becomes a liability because of the statutory obligation to plug it.

Blundon applied this same rule of declining rock pressure to the depreciation of the gas well equipment, and as we have already indicated, the commissions of both West Virginia and Ohio adopted and used Blundon's principles in depreciating both accounts. (R., 202, 203.)

The only possible excuse for applying observed depreciation to the gas well equipment, to the casing and tubes, is that there is a salvage value.

Surely the cost of withdrawing the casing and the tubes and the plugging of the gas well would largely eat up any possible second-hand value of the casing and tubes. So, is it not reasonable for us to insist that the gas well equipment should be depreciated in exactly the same way that gas well construction is depreciated, in proportion to the depletion of the gas as determined by the decline in rock pressure? (R., 1511, 1512.)

There are a number of interesting West Virginia cases, in some of which Ford, Bacon and Davis represented the utility. But it is sufficient to refer to one—*Re Clarksburg Light and Heat Co.*, decided in December, 1927, P. U. R., 1928B, 290, pp. 313, 314. Ford, Bacon and Davis had made a report on depreciation and, of course, had been represented in the testimony. We take this from the opinion of the commission:

> "It is evident the engineers have not taken into account the cost of salvaging the equipment and the cost of complying with the West Virginia law requiring abandoned wells to be securely plugged. Moreover, it is impossible to disassociate the cost of labor and the cost of material in determining the value of a structure. Upon its abandonment the cost of labor is entirely lost, except for its salvage value less the cost of salvaging it. No further evidence of salvage value of gas well equipment was adduced, and, it appears that a consistent and fair treatment of this account warrants the application of a percentage of depreciation equal to that for gas well construction. And it is noted that on December 31, 1926, the average rock pressure had continued to decline until a per cent. condition of 34.6 was fixed in Lerch Exhibit No. 7."

Blundon, for the city, based his depreciation, both of the gas well equipment and of the gas well construction, upon the depletion of the gas well itself—upon the proportionate amount of gas that could still be reasonably expected to be withdrawn from the well as reflected by the decline in rock pressure. (City Ex. No. 74, p. 9, Original.) He thus arrived at a depreciation of 58.11 for the two accounts. (R., 1509-1511.) This is the depreciation used by the commission and the court.

In the United Fuel gas case in West Virginia where both Lerch and Blundon testified on the subject of gas well depreciation, Blundon's method of depreciating both gas well construction and gas well equipment on the basis of decline in rock pressure was adopted by the Public Service Commission. (R., 2958.)

We submit that the method presented by Blundon, adopted by the commission and approved by the court, is a proper one and that it would have been employed by Ford, Bacon and Davis as to Account 211 in this case had it not been dominated by orders from the Columbia System. The complaint of the Columbus Company in the matter is without merit."

4. Unoperated Leaseholds—The Ohio Fuel Gas Company.

Under sub-heading 4 at page 66 of its brief (Appellant's Brief, page 66) appellant complains of the finding of appellee affirmed by the court below that only those leaseholds known as Class No. 1, or operated leaseholds, were actually used and useful and excluding from the valuation in operated leaseholds known as Classes 2, 3, and 4.

Counsel for the city of Columbus in their brief in the Columbus Gas case supra (Brief of Appellee, the City of Columbus, in the Columbus Gas case, supra, pages 132 to 147, inclusive) very ably discuss this subject in the following manner:

"The company urges that these leaseholds are owned

and used by Ohio Fuel as the source of supply of natural gas. This contention, as we shall see, is refuted by the company's own evidence which shows that there are no producing wells on No. 2, No. 3 or No. 4 classifications and that they are all unoperated.

Ohio Fuel possesses some rights in certain acreage which are referred to as leaseholds. It owns no part of it in fee and no tax is paid upon it to either county or state but it is held only by leases that give the company the right to enter upon the land and prospect for and remove oil and gas in accordance with specific terms set forth. These leases are made for a term of years and must be renewed at the expiration thereof, unless wells are drilled, in which event they continue as long as gas and/or oil is produced. There are more than 100 different forms of leases but all of them are basically very much the same. The owner of the land is paid a small cash consideration at the time of the execution of the lease and is also paid a rental while his land remains unoperated, but in case of production a fixed percentage is paid as royalty on oil wells and a definite cash sum is paid annually for each gas well. The usual amount paid for a gas well is $200.00. (R., 1080, 1081.) The sums thus paid for operated acreage are an operating expense and were allowed by the commission and the court. (R., 181.)

The Columbus Company presented certain claims for alleged valuations of the leaseholds of Ohio Fuel, (R., 2910, 2911), which were put in evidence through Seyffert.

It produced for cross-examination Dally, Wittmer, Meals and Webber, who made up the said valuation figures. They did not give any direct testimony on the subject. We shall have occasion to discuss their statements rather fully under Operated Leaseholds.

To these leaseholds Ohio Fuel assigned, and the Columbus Company presented, the following classifications and astounding values:

Class 1, Operated,	291,396	acres,	$19,252,029.
Class 2, Unoperated,	164,739	acres,	12,274,635
Class 3, Unoperated,	312,631	acres,	5,281,866
Class 4, Unoperated,	2,065,421	acres,	6,195,947
Total	2,834,187	acres,	$43,004,477.

(R., 2911.)

The definition of these classes are set forth at R. 3124, and are as follows:

"Class 1. Leases of tracts of land having producing gas wells drilled thereon from which gas is being furnished to the public.

Class 2. Leases of tracts of land proved by actual developments and operations in the immediate vicinity thereof to be good gas-producing lands, but which do not have any producing wells drilled thereon.

Class 3. Leases of tracts of land shown by surrounding of neighboring developments of operations, geological considerations, etc., to be reasonably certain to be good gas land, at least as to large portions thereof, but not yet demonstrated to be such by actual drilling.

Class 4. Leases of tracts of land situate within the areas of territory where gas sands are known or assumed to exist from general geological conditions,

but which are so remote from actual gas-producing wells or territory that they are merely prospective gas lands."

In the ordinary course of its business Ohio Fuel carries this acreage on its books as just "operated" and "unoperated," but for the purpose of rate litigation it is divided into Classes 1, 2, 3 and 4 on the basis of the foregoing definitions. As a matter of fact, there are really only two classifications and naturally they are the operated leaseholds, in which active wells are located, and the unoperated or prospective or possible acreage.

When a well that produced gas is drilled the entire leasehold upon which it is located, whether it consists of 10 acres or 1000 acres, becomes known as "operated" acreage. (R., 998, 1027.) Dry holes, or non-productive drilling expense incurred in prospecting for gas, are paid for out of revenues as an operating expense and have been so allowed in this case. (R., 179, 217.)

On this total of 2,834,187 acres of mere leases, to which, with the exception of the "operated," consisting of 291,396 acres, it has only the right to enter, explore for and remove gas if found, Ohio Fuel claimed a value of $43,004,477.00, (R., 2910), which is almost two thirds as much as the value of all its other properties and demanded a return of 8 per cent. thereon. It also demanded the right to charge to operating expenses delay rentals on the 2,542,791 acres that are unoperated in the sum of $1,684,913.00 annually. (R., 2908.) Of course no commission or court could allow such presumtuous claims.

But that is not all. The Columbia System would not only place these entire leaseholds in the rate base at high imaginary values and collect an 8 per cent. return thereon but, while charging the delay rentals to operating expenses, it would also have the consumers pay these values to Ohio Fuel through amortization at 4 per cent. annually over a 25-year period. (R. 2907.) If the company sees fit to fail to renew any of these leases, or to drop any of this acreage for any reason, no adjustment is proposed for the benefit of the consumer; it would have him continue to pay just the same as on the original basis of leaseholds as of the date certain. The utter injustice of this proposal is shown by the fact that although witnesses for the Columbus Company said that all of the unoperated acreage was necessary on December 31, 1929, in 1930 Ohio Fuel abandoned 525,445 acres of this unoperated leased territory. The consumers, it would plainly appear, enjoy a distinct privilege under such a system and that is to be exploited.

There is another matter which should here be remarked althongh we shall discuss it later. There is a private oil producing corporation known as The Preston Oil Company operating in Ohio which, like the Columbus Company, Ohio Fuel and United, is a subsidiary of The Columbia Gas and Electric Corporation. As we shall show, the unoperated acreage claimed for this oil company is the same as that claimed by Ohio Fuel, but Ohio Fuel, the public utility, has always assumed the expense of securing all leaseholds for both companies and also the payment of all delay rentals. The Preston Oil Company

pays no lease rentals; those have always been charged as an operating expense to the utility. In this situation is found a measure of the reason for the gas company desiring to include vast unoperated acreages in its rate base. (R., 1002-1023.)

Class 1, deisgnated "operated," consisting of 291,396 acres, is the only acreage upon which any wells are located and consequently is the only part of the listed leaseholds in Ohio from which consumers are being supplied with gas. Although not fully drilled, it is the property considered as "actually used and useful," (Section 614-46, G. C., Appendix), by the commission and court for the purpose of determining proper rates for the ordinance period in question.

The record shows that while Ohio Fuel allegedly holds 2,542,791 acres of unoperated leaseholds, it is at the same time purchasing about one-third of its gas from United of West Virginia and approximately a little less than another third from independent producers in Ohio and is thus actually obtaining only about one-third of its necessary volume from its own Ohio acreage. (R., 2905, 2906.)

How, in the name of reason, can any company demand, much less expect, to saddle 2,542,791 acres of unused leaseholds and 291,396 acres of partially used leaseholds upon the backs of existing gas consumers while it buys almost two-thirds of its supply of gas elsewhere?

Much of this 2,542,791 acres of unoperated leaseholds, if it has gas under it, will be furnishing a supply for the second and third generations of existing consumers' chil-

dren and others. How can anyone then, except those who have an interest in boosting the price of gas, even profess to believe that existing consumers should be burdened with such a futile load? That is just what the Legislature in Section 614-46, G. C., limiting rate base property to "actually used and useful," meant to and does forestall.

The pertinent part of Section 614-46, G. C., is as follows:

> "If the commission, after such hearing, shall be of the opinion that the rate, price, charge, toll or rental so fixed by ordinance is or will be unjust or unreasonable, or insufficient to yield reasonable compensation for the service, the commission shall, with due regard to the value of all the property of the public utility, actually used and useful for the convenience of the public, * * * fix and determine the just and reasonable rate, price, charge, toll or rental to be charged, demanded, exacted or collected by such public utility, during the period so fixed by ordinance. * * *." (Appendix.)

The Ohio Legislature, commission and court are in accord that existing consumers must not be burdened with tremendous charges for acreages which are not now, and perhaps never will be, of any use to them.

* * * * * * * * * * * * * * * * * * *

Seyffert, on direct examination, said, assuming that Ohio Fuel could buy gas from independent producers and United in the amount that it was then buying, the amount of gas in the ground would be equivalent to about a 10 year period, and that if Ohio Fuel were not able to buy gas from other sources the present supply would be

equivalent to a 5 or 6 years' supply. Naturally the witness was attempting at that time to minimize the amount of gas to be recovered from Class 1 acreage, but, even actuated by that motive, the best testimony offered was that under present conditions the supply would last for 10 years. (R., 1052, 1053.) The Columbus Company offered no evidence that Ohio Fuel anticipated any change in its source of supplies and there exists no basis for assuming that there will be an alteration of existing conditions. The testimony of Dally and Wittmer estimates a much greater existing supply than that given by Seyffert. (R., 1098, 1164.) Wittmer and others said the probable recovery from Class 1 acreage yet obtainable will reasonably average 4,000,000 cubic feet per acre. (R., 1164.) This would make a total reserve in the operated acreage of 1,165,584,000 M c. f. Enough gas to last Ohio Fuel for more than 20 years on the basis of its present total annual sales buying none from independent producer or from United.

. . . . . .

The evidence discloses that several witnesses say there is a large reserve in the Class 1, or operated, leaseholds. This is, of course, in addition to the life which remains in the presently existing wells. Dally, for the company, testified as follows:

> "Commissioner Geiger: How long has acreage No. 1 been drawn from, for what period of time, on the average?
>
> The Witness: I don't know what the average is but some of it has been drawn for a number of years.

Commissioner Geiger: I know that, but—

The Witness: A good deal of it lately—later years; not so far back.

Commissioner Geiger: Well, are you prepared to say that in your judgment 90 per cent. of the original gas content of acreage No. 1 still remains in the ground?

The Witness: Approximately that amount." (R., 1136.)

He also said that he estimated 4,000,000 cubic feet of gas per acre still remaining in the operated leaseholds. (R., 1098.)

Meals also testified that there was much drilling yet to be done on Class 1 acreage and he had no doubt but what large volumes of gas would still be found on it. (R., 1215.)

The record very definitely shows that the operated acreage is not fully drilled and, in the opinion of gas men, contains a large reserve within itself in addition to the gas yet to be drawn from existing wells. The commission and court had every right to conclude from the evidence that untold quantities of gas may yet be obtained from Class 1 acreage.

In light of the facts and the real situation it does the Columbus Company no credit to pretend that the reversed finding of the majority commission that Class 1 acreage would be exhausted 3 years and 2 months after December 31, 1929, is correct. It made no such claims or pretensions for Ohio Fuel during the trial of the case. In fact, if its counsel really believed exhaustion of the

operated acreage so imminent and immediate, how can they ever justify the purported market value of $19,252,029.00 (R., 2911), for which they then contended? This conflicting and irreconciliable position of the appellant was fully presented to the lower court.

The Columbus Company pretends to believe Class 2 acreage used and useful because it is being drained seriously by wells located on Class 1, but this is a highly speculative matter about which no one can be certain. One company witness even minimized the claim. Dally, for example, testified that he assumed that acreage No. 2 had not been touched, as far as drawing gas from under it is concerned, except where wells in Class 1 might be very close to Class 2, but that Class 2 is not seriously affected. (R., 1136, 1137.) Others of the company's witnesses testified that no one could tell where gas exists or how the pools or pockets may extend except with the point of the drill. (R., 1567.)

The commission, majority and minority, found that Classes 2, 3 and 4 are not actually used and useful and excluded them from the rate base. The majority do so in this language:

> "In the case of the *Logan Gas Company v. The Public Utilities Commission of Ohio*, 124 O. S., 248, what is now known as the operated acreage was there designated 'class number 1,' while the unoperated acreage was designated as 'classes number 2, 3 and 4,' depending on the relative likelihood of each such class becoming producing acreage. In the case in question it was held by the Supreme Court in a somewhat divided opinion that neither class number 2, 3 or 4 should be considered in fixing the valuation

of the property that was then used and useful. The Commission has determined that the acreage at present used and useful by The Ohio Fuel Gas Company in produing gas, a part of which reaches the Columbus gateway, is 291,396 acres."

Under similar facts with the same classification of leaseholds employed in this case, the Supreme Court of Ohio had held in *Logan Gas Company v. Public Utilities Commission of Ohio*, 121 O. S., 507, at pages 509 and 510, 169 N. E., 575:

"As to class No. 2, to wit, leases of tracts of land proved by actual developments and operations in the immediate vicinity thereof to be good gas-producing lands, but which do not have any producing wells drilled thereon, the majority of the court are of opinion that, while the leases upon territory of such character may in the future be 'useful,' the same do not come within the purview of the statute, which requires the property to be given valuation to be both 'used and useful.' The leaseholds covering such character of territory, not being both 'used and useful,' the commission's views upon that point are affirmed. The judges concurring in this view are Marshall, C. J., Kinkade, Robinson, Matthias and Allen, JJ.

As to classes 3 and 4 all judges concur that the Commission was right in not allowing valuation therefor as property 'used and useful.'"

In the case at bar the court, citing the Logan Gas case, supra, with approval, again sustained the decision of the commission excluding Classes 2, 3 and 4 leaseholds (non-producing) from the valuation upon the ground that the property was not actually and useful. *Columbus Gas &*

Fuel Co. and City of Columbus v. Public Utilities Com., 127 O. S., 109, 187 N. E., 7. (R., 50, 62, 63.)

The case of *United Fuel Gas Company v. Public Service Commission of West Virginia*, 14 Fed (2d), 209, was on a bill in equity before a three-judge court to enjoin the commission from enforcing its order with reference to rates for gas, on the ground that by the orders of the commission complainants property was being taken from it without due process of law. The court made detailed findings and denied the application for an interlocutory injunction. One of the main issues was the value of the gas leases. The gas company controlled the production of natural gas from 814,910 acres of land.

The lower court included in the rate base the assessed value of only 136,384 acres (proven), which were then being used in production, and excluded on the ground that they were not presently used and useful in the public service, 126,208 acres described as probable, and 552,319 acres classed as improbable or unfavorable, valued by the gas company at $26,000,000.00. The statutory court said:

> "Among the questions raised by the claim of the plaintiff, that the value of the gas under the various classes of acreage shall be treated as a part of the value upon which it is entitled to a return are: First, What is the amount of gas under each class? Second, What is its present value? Third, How much of that value is presently used in the public service?
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> . . . . . .
>
> "Its right to relief is nevertheless absolutely dependent upon its being able to maintain the position that it is entitled to a fair return upon the present value of such of its property as is used and useful

in the public servie. Whether it showed good judgment in acquiring and holding any other property is irrelevant to any issue upon which it here seeks a decree. No part of the gas which is supposed to be under the acreage classed as either probable or possible is 'used' in the public service or for that matter in any other, in any ordinary sense of that word.

"It will be noted that the total of the gas underlying the proven acreage was 249,100,100 M c. f. As the plaintiff sells annually about 47,000,000 M c. f. of which 10,500,000 goes to the West Virginia retail purchasers, it has under its proven territory gas enough for everybody for more than five years, and an amount sufficient to meet the needs of its public service patrons alone for almost a quarter of a century.

"For the reasons already stated, we cannot see how any other portion of its gas can be held to be used in the public service, no matter how elastic a definition be given to the word 'used.' At the risk of tiresome repetition, we can say that we do not criticize the plaintiff for acquiring any or all its gas rights. It was doubtless wise to get them. All that we decide is that, in arriving at the rate base upon which plaintiff is entitled to a fair return, we may not combine two opposing theories. We are not justified in saying that, because plaintiff's investments in gas reserves were prudent, those reserves immediately went into use, and that, therefore, plaintiff is entitled to have them appraised at the many times higher value it says they now have. If, in dealing with its tangible property, and going concern value, we are required to ignore, except for check purposes, plaintiff's investment in them, we must apply the same rule to its gas reserves."

It will thus be seen that the court decided squarely that only the developed acreage should be included in the rate

base, and excluded from the rate base 80 per cent. of the company's acreage, valued by it at $36,131,865.00.

The decision of the three-judge court, denying an interlocutory injunction, was affirmed by this court, *United Gas and Fuel Company v. Public Service Commission of West Virginia*, 278 U. S., p. 322, 73 Law. Ed., 402, 49 S. Ct., 157.

Ohio Fuel has acquired much of its unoperated acreage over and above its requirements for the two-fold purpose of preventing competition and increasing the value upon which rates may be based. If it is able to obtain control of what shows promise of becoming gas acreage it, of course, is able to prevent other companies from coming in and making use of it for the purpose of competition. Quite naturally, if while keeping out competitors it can boost its rate base and compel consumers to carry the load it is in a very formidable position. The company would use unreasonable rates to its customers, based upon alleged value and carrying charges for unused acreage, with which to prevent competition when that very competition would doubtless assure lower rates to gas users. This may be good business judgment on the part of the company, but certainly consumers should not be required to carry such a burden.

The claims of the Columbus Company in this case in behalf of Ohio Fuel demonstrates conclusively the necessity for commissions and courts drawing a definite line of demarcation between leaseholds that may be included in a rate base and those that may not be included. Commission regulation will be circumvented, thwarted and

eventually destroyed by ambitious and grasping gas companies unless some definite rule of inclusion prevails. The law is clear, the dividing line in Ohio lies between the acreage which is "actually used and useful" and that which cannot be so regarded. This rule has always been applied in Ohio by both commissions and courts.

This doctrine has been applied generally. In *Los Angeles Gas and Electric Corporation v. Railroad Commission*, 289 U. S., 287, 305, it was said by this court:

> "This court has repeatedly held that the basis of calculation is the fair value of the property, that is, that what the complainant is entitled to demand, in order that it may have 'just compensation,' is 'a fair return upon the reasonable value of the property at *the time it is being used for the public.*'" (Italics ours.)

And the following may be mentioned as typical cases:

San Diego Land & Town Co. v. National City, 174 U. S., 739, 757, 43 L. Ed., 1154, 1161, 19 S. Ct., 804;

Smyth v. Ames, 169 U. S., 466, 547 L. Ed., 819, 849, 18 S. Ct., 418;

Willcox v. Consolidated Gas Co., 212 U. S., 19, 41, 53 L. Ed., 382, 395, 29 S. Ct., 192;

Minnesota Rate Cases (Simpson v. Shepard), 230 U. S., 352, 434, 57 L. Ed., 1511, 1555, 33 S. Ct., 729;

Missouri ex rel. Southwestern Bell Teleph. Co. v. Public Serv. Commission, 262 U. S., 276, 287, 67 L. Ed., 981, 984, 43 S. Ct., 544;

Georgia R. & Power Co. v. Railroad Commission, 262 U. S., 625, 631, 67 L. Ed., 1144, 1147, 43 S. Ct., 680;

Bluefield Waterworks & Improvement Co. v. Pub-

lic Serv. Commission, 262 U. S., 679, 690, 67 L. Ed., 1176, 1181, 43 S. Ct., 675;
McCardle v. Indianapolis Water Co., 272 U. S., 400, 410, 71 L. Ed., 316, 325, 47 S. Ct., 144;
St. Louis & O'F. R. Co. v. United States, 279 U. S., 461, 484, 485, 73 L. Ed., 798, 808, 809, 49 S. Ct., 384.

In conclusion we again invite attention to the inclusion by the commission, with the sanction of the court, of dry hole or "non-produtive well drilling expense" incurred in exploration for gas as an operating expense of Ohio Fuel. In recent years the company claims to have expended amounts as follows for this item:

1927	$495,139.46
1928	557,320.95
1929	618,788.82
1930	635,242.74

City Ex. No. 89, Original.

The figure used in this case is based upon the experience of the company in 1929. (R., 179.)

We further invite attention to the ruling of the commission that when non-productive acreage is brought into production the cost incurred in carrying it through its non-productive period may well go into valuation and be capitalized. (R., 156.)

The commission and court in this case, under the facts and the law, very properly eliminated Classes 2, 3 and 4 from consideration."

5. Operated Leaseholds—The Ohio Fuel Gas Company.

Under sub-headings 5, 6, 7, 8 and 9, appellant, in its brief (Appellant's Brief, pages 72 to 108, inclusive) complains of the method used by appellee and the court below in its valuation of what are known as Class No. 1 or operated leaseholds.

The city of Columbus in its brief (brief of appellee, the city of Columbus, in the Columbus Gas case, supra, pages 149 to 168, inclusive), discusses this subject at considerable length. That portion of its discussion which is pertinent to this case follows:

"The operated leaseholds of Ohio Fuel on December 31, 1929, consisted of 291,396 acres. A lease constitutes a unit for development; if one producing gas well is discovered on leased premises, regardless of its size, the entire acreage is classified as operated. (R., 1148, 1150.) The fact that it may be still further developed does not change the classification.

The valuation set forth in the record for this acreage does not include gas well construction or equipment which are separately evaluated and included. (R., 180, 217.)

The royalties paid on Class No. 1, or operated leaseholds, amounting to $538,206.00 annually, are recognized as an operating charge and allowed as part of production expense. (R., 181, 218.)

The leasehold claims were introduced through Seyffert. The values were assigned by Dally, Wittmer, Meals and

Webber, and although they did not give any direct testimony on the subject they were produced for cross examination. These are the alleged market values the witnesses gave to this Class 1, or operated acreage:

		Value per Acre.
A. B. Dally.....	$26,225,640	$90.00
Geo. Wittmer, Jr.....	21,825,000	74.79
S. W. Meals.....	17,483,760	60.00
D. S. Webber & Son.....	11,473,717	39.37
Average	$19,252,029	$66.07

(R., 2911.)

There are good and sufficient reasons for the commission and court rejecting both the company's exhibits and the testimony of their witnesses in respect to these leaseholds and their claimed valuation.

Not one of these men can be said to be disinterested, since all of them are engaged in the natural gas business and it is to the advantage of each of them to boost the value for leasehold acreage as high as possible.

Dally is associated with the Benedum Trees Oil Company, which has recently become connected with the Columbia System. He is an official in a number of natural gas companies and is president of the Penn Oil Gas Company, which is a producing company with approximately 60,000 acres of leaseholds in Ohio, selling gas to the Ohio Fuel. He has been often used as a witness on leaseholds, having appeared in the Iroquois Gas Company case in New York, the United Fuel case in West Virginia and the Logan case in Ohio. (R., 346-350.)

Wittmer is an officer in a number of gas companies and is a director and treasurer of the Wittmer companies. These companies possess about 100,000 acres of leaseholds in Ohio. They sell gas to utilities and Ohio Fuel is among their customers. He has also often appeared as a witness, testifying for the Philadelphia company, the People's Natural Gas Company of Pittsburgh and the Iroquois Gas Company of Buffalo. (R., 351-354.)

Meals is president of the Carnegie Natural Gas Company and had a personal interest in leaseholds in Ohio in 1929 and 1930 and still held such interests when he testified. He has been widely used in gas litigation, having appeared for the Philadelphia company, the People's Natural Gas Company, the Iroquois Gas Company and the Logan Gas Company. (R., 355-358.)

Webber was for 15 years an employee of the Ohio Fuel and at this time is a stockholder of the Columbia. He is also personally interested now in a number of leaseholds in Ohio. He too has become rather professional as a gas witness, appearing in the Logan, Dayton Light and Power, Iroquois and the East Ohio cases. (R., 359-360.)

The position of these men is well expressed in the following opinion:

> "These business witnesses are all highly competent men. Every one of them is, however, interested in natural gas companies. Perhaps it would not be unnatural to suspect that they are inclined to think well of properties similar to that of which they are part owners. It is scarcely possible that their judg-

ment remains altogether uninfluenced by the fact that the judicial decision of some of the questions raised in this case may be of great importance to their own companies."

United Fuel Gas Company v. Public Service Commission, 14 Federal (2nd), 209.

The attention of the court is invited to the great difference in value assigned by these men. Between the lowest guess and the highest guess there exists a spread of almost $15,000,000.00, and bear in mind that this is on only the 291,396 acres. Between the lowest and the next highest there is a chasm of more than $6,000,000.00 and between the lowest and the third highest there is a divergence of more than $10,000,000.00. This proves in a convincing manner the non-existence of a leasehold market. If there were anything like an exchange market the value of these leases could be given by disinterested men acquainted with such matters so that only reasonable differences would separate their estimates. It would not be a matter of mere guess and hazard but something upon which well-informed men could not possibly disagree so widely.

Now and then there are in Ohio a few isolated transactions in which comparatively small tracts of gas leaseholds are bought and sold, but there has been no such open dealing in these properties as is necessary to establish anything like defined or trustworthy market values.

A studied effort was made by these leasehold witnesses to escape the fatal features of so-called market value testimony which has been found prevalent in such mat-

ters in every well considered decision of courts and commissions, but nevertheless they could not conceal the fact that their estimates of purported market value of the leaseholds was bottomed upon some guess or assumption as to the quantity of recoverable gas under the leases and the possible value of that gas at some assumed price in some existing regulated or imaginary unregulated market. The evidence is indeed so speculative and vague that it is unreliable in fact and incompetent in law.

There exists a very important encumbrance upon these leaseholds arising out of the public utility obligation resting upon them, but the witnesses, in placing a so-called market value upon them, gave it no consideration. On this point in *The City of Charleston v. Public Service Commission*, 110 W. Va., 245, P. U. R., 1931E, 74, the West Virginia Court of Appeals said at pages 81-82 (P. U. R. citation):

> "That value was placed on the leaseholds by witnesses who had in mind chiefly an unregulated use of the gas. However, the leaseholds are subject to the requirements of the public. This subjection constitutes a 'genuine encumbrance' (Dr. Gray, economist) which conceivably might impede the sale of the leaseholds on the open market. See opinion of Mr. Justice Stone in United Fuel Gas Co. v. Kentucky R. Commission, 278 U. S., 300, 317, 73 L. Ed., 390, P. U. R., 1929A, 433, 49 Sup. Ct. Rep., 150. The witnesses did not take into consideration the far reaching effect of this incumbrance, but for rate-making purposes the incumbrance must be considered."

This situation alone, to make no mention of intercorporate connections, clearly indicates that the alleged offer of Benedum-Trees Oil Company to Ohio Fuel was a mere sham and the commission committed no error in refusing to permit it to become a part of the record because it held no evidentiary value.

It is, of course, important to understand how the witnesses arrived at their final figures of value.

Upon cross examination Dally testified as follows:

> "Q. Mr. Dally, what were the controlling factors considered by you in arriving at the value of this leasehold acreage? A. Starting with the acreage which had been drilled, I considered the wells in their production, the rock pressure, the amounts of gas that they had produced or were producing, against the conditions named in the record here; their location on the territory. That was the general conditions." (R., 1093.)
>
> "Q. And what would govern them after getting the substantial gas content? What would then govern, what you could get for it in the market? A. Well, of course the test of that is the rate or price you get for the gas and that rate or price is minus all the things that it takes to operate a gas company, including the dry holes that I mentioned this morning and the hazards, all has to go in against that whatever the charges are. Then you arrive at what you can afford to sell that gas per thousand at in the market." (R., 1094.)

Further cross examination showed that Dally figured the valuation he assigned to the leaseholds by considering the possible gas content of the acreage and an estimated rate for gas as a competitive fuel in a fancied unregulated market. (R., 1128, 1129.) In this the wit-

ness unwittingly ran afoul of one of the weaknesses of the United Fuel Gas case. His answers conclusively prove an inadmissible assumption within the rule laid down by Mr. Justice Stone when he said:

> "It is true that a part of appellants' business is not regulated at present, but it does not appear that the ultimate distribution of their product to consumers in other states will be immune from regulation either because of the interstate commerce clause, Pennsylvania Gas Co. v. Public Service Commission, 252 U. S., 23; Public Utilities Commission v. Landon, 249 U. S., 236, or for other reasons, and there can be no reasonable assumption that it will be. The unique character of appellants' control over a natural product, limited in amount, asserted here as a basis of value, the obvious necessity of securing franchises or special privileges to enable them to distribute their product to consumers under the conditions assumed, and other circumstances which subject them to regulation in Kentucky and West Virginia, make inadmissable the assumption that the price to consumers would remain unregulated elsewhere."
>
> *United Fuel Gas Co., et al. v. Railroad Commission of Kentucky*, 278 U. S., 300, at p. 417, 73 L. Ed., 390, 49 S. Ct., 150.

Such testimony possesses no probative value.

Later in his testimony Dally said he considered Class No. 1 still 90 per cent. good, (R., 1136), and, allowing for the gas that had been taken out of this operated acreage, he had estimated a remaining 4,000,000 cubic feet per acre. (R., 1098.) Having thus estimated the probable gas content of the territory and considered the price for which he could sell the gas, Dally arrived at this figure for the value of the property. (R., 1098-1101.)

In the cross examination of Wittmer it developed that he too had taken into consideration the probable amount of gas in the acreage in order to determine the value. (R., 1158.) He said the recovery, in his opinion, would vary from 2,000,000 to 10,000,000 cubic feet per acre with an average of 4,000,000 cubic feet per acre, (R., 1164), and the value given the leaseholds was calculated upon the highest price he could hope to obtain for the gas in an unregulated market. (R., 1171-1172.) There is virtually no unregulated market in Ohio, because when a company supplies natural gas to more than one consumer, domestic or industrial, it is a public utility subject to regulation. G. C., 614-2, 614-2a, 614-3, appendix. The vague market to which he referred was never named. The Wittmer companies, of which he is treasurer, sell their gas to Ohio Fuel and other utilities at 18 cents per M c. f. and Wittmer himself admitted that it was a fair price and that these companies were getting along all right. (R., 1204, 1205.)

The witness Meals said that he arrived at his figure of value in almost the same way. (R., 1221, 1222.) He was sure he could sell the gas from this acreage in some markets for more than 15 cents or 18 cents per M c. f. but added, "I don't know where." (R., 1223.) And yet, when he attempts to place a market value on leaseholds for rate purposes he employs a 20 to 25 cent rate per M c. f. at the well and a higher rate to be obtained in some mythical unregulated market. (R., 1224.) The premise upon which such a market value is figured is conjectural and speculative, to say the least.

Webber, too, took into consideration the probable gas content of the acreage and the price that he could get for it. (R., 1284.) He admitted that Pittsburgh is occupied but named the distant eastern towns of Rochester and Buffalo as possibilities for industrial gas. He further stated that the Iroquois Gas Company was already furnishing service in that field. (R., 1288, 1289.) And still further on he related that he had in mind, if there was a sufficient amount of proven acreage acquired, going to some town and, if possible, securing a franchise to go into that town and supply it with gas. This would certainly presume selling in a regulated market. (R., 1291, 1292.) He also admitted, as did the other witnesses, that he knew of no transactions in Ohio involving leasehold acreage of the extent, quality and character of those of Ohio Fuel. (R., 1289.) Thus the so-called market value of this witness was also speculative, conjectural and indefinite.

Since all of these witnesses estimate the gas content in the ground and the price which may be obtained for the assumed volume in an imaginary market, and upon those bases presume to set a so-called market value for the leaseholds while similar properties similarly situated are not being exchanged, as is shown by the evidence, the method and result do not differ from those found in causes where the testimony has been held wholly incompetent.

We submit that there is no market and that the bases assumed by these company witnesses were wholly speculative and uncertain, but that, even though there were

a market, the value of the lands for rate purposes could not be established by what they would bring in exchange. They are being used in a regulated business where rates cannot be built up by employing a value that depends on earning capacity. Under such a system the value is based on the earning capacity and the earning capacity on the value and the result is a vicious circle. Courts have almost unanimously rejected such methods of valuation.

In the case of *United Fuel Gas Company v. Railroad Commission of Kentucky*, 13 Fed. (2nd), 510, the utility sought to prove the so-called market value both by the testimony of geologists and engineering experts and by the testimony of men experienced and interested in the production and marketing of natural gas who purported to assign to the leaseholds a market value or exchange value or the price which the property would bring if sold by a willing seller to a willing buyer. In the course of his opinion holding that such testimony was incompetent and that the only competent testimony in the record was the book value, Judge Hickenlooper, at page 519, among other things, said:

> "The other witnesses for the complainants arrive at their valuation upon the exchange value basis. Both methods have in contemplation the value of the use, and both consist of capitalizing the earning power of the properties in arriving at their value. The fallacy of this argument, that, because of the earning capacity and large return allowed, the property has greatly increased in value, and that such increased value should thereupon be taken as the basis for another calculation of a still larger return,

would seem quite apparent. The fallacy of valuing the use upon the earning capacity, and then fixing rates upon the value thus determined, has been observed by Mr. Justice Hughes in the Minnesota Rate Cases, 230 U. S., 352, 461, 33 S. Ct., 729, 57 L. Ed., 1511, 48 L. R. A. (N. S.), 1151, Ann. Cas., 1916A, 18, and by Mr. Justice Brandeis in his concurring opinion in the Southwestern Telephone Co. case, supra. See also the following cases, to the effect that earning power, in the sense of good will or franchise value, must be excluded from consideration in arriving at the rate base: Willcox v. Consolidated Gas Co., 212 U. S., 19, 52, 29 S. Ct., 192, 53 L. Ed., 382, 15 Ann. Cas., 1034, 48 L. R. A. (N. S.), 1134; Cedar Rapids Gaslight Co. v. Cedar Rapids, 223 U. S., 655, 669, 32 S. Ct., 389, 56 L. Ed., 594; Des Moines Gas Co. v. Des Moines, 238 U. S., 153, 165, 35 S. Ct., 811, 59 L. Ed., 1244; Galveston Electric Co. v. Galveston, 258 U. S., 388, 396, 42 S. Ct., 351, 66 L. Ed., 678; Georgia Railway v. Railroad Commission, 262 U. S., 625, 632, 43 S. Ct., 680, 67 L. Ed., 1144.

"The language of the Supreme Court of Appeals of West Virginia upon this question seems peculiarly apt: 'However, as we interpret those cases, the "present fair value" for rate-making purposes does not mean the market value of the property as determined by the rate of return, or as based upon earnings when the reasonableness of the return or earnings is in question. If it does, then an increase in rates would increase the market value of the property, and that would again call for further increase. This would recur again and again; rates increasing values, and increased values requiring increased rates, would follow each other, to avoid confiscation under the Constitution. This vicious pyramiding would go on and on, until the point would be reached where the public would cease patronizing the utility rather than pay the price. The net result would be that the public would always be compelled to pay

"all the traffic would bear," and governmental regulation of the prices to be charged would be at an end. Its only function in that respect would be to prevent discrimination.' City of Charleston, et al. v. Public Service Commission, et al., 95 W. Va., 91, 120 S. E., 398. Innumerable other authorities are cited by counsel for the municipalities to the same effect, but the situation would appear to be too clear for extended discussion."

The decision of the statutory court on this point was sustained in *United Fuel Gas Co. v. Railroad Commission of Kentucky, supra,* where Mr. Justice Stone in commenting upon both types of proof offered by the utility said at page 316:

"Appellants' second class of expert testimony is that of men experienced and interested in the production and marketing of natural gas, who purported to assign to appellants' gas field what was described on the argument as its present exchange value or the price which the property would bring if sold by a willing seller to a willing buyer. Three such witnesses testified to a present value of appellants' gas field in amounts varying from $30,000,000 to $35,000,000 and a fourth fixed the value at $45,000,000. Examination of their testimony discloses that these estimates were not based on prevailing prices for gas leases or on actual sales but, as in the case of the geological and engineering experts, upon an estimated or assumed exhaustible supply of gas available to appellants until exhausted, and upon a predictable price for natural gas in unregulated markets through a future period of about eighteen years. Common characteristics of both methods of valuation, therefore, are the estimation on uncertain bases of the volume of gas available and of the price at which it may be sold through a long future period."

And it was further held at page 317:

> "Waiving these not inconsiderable difficulties in the way of establishing value, we pass to another and more serious difficulty. In both methods of valuation, the value of property used in a business whose rates are regulated is made to depend on an assumed earning capacity, and the data relied on to establish assumed earning capacity are themselves essentially speculative—so much so as to form no trustworthy basis for the computation of value."

In *The Logan Gas Company, et al. v. Public Utilities Commission of Ohio,* 124 O. S., 248, 249, 177 N. E., 587, the Supreme Court of Ohio, in discussing evidence of this character, said:

> "In hearing the evidence and in arriving at a conclusion as to the market value of the leaseholds in question, the commission was not convinced of the probative value of evidence of market value testified to by the company's experts, because such evidence necessarily was not and could not be based upon the price such property would bring in the open market, with a willing seller and a willing buyer, there being no such market by reason of the system of organization and operation of the Logan Gas Company and other gas companies; that each company in its own field constitutes, in effect a monopoly; that actual value depends upon the company's earning capacity, based upon the price which the company is willing or obliged to pay for the gas in the ground, the cost of production and distribution, and the price the commission will allow it to charge the consumer; that to base market value upon such premises was but in a large measure to base it upon the very rate which the commission was seeking to determine."

The majority commission, in passing upon the competency of the testimony of these witnesses, used the following language:

> "Manifestly the present value depends upon the quantity of gas below the surface, and as gas is withdrawn, the acreage becomes less valuable in proportion that the withdrawn gas bears to the gas still to be captured."
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> * * * * * * * * * * * * *
>
> "We are at once confronted with the question of the probative value of evidence touching the market value. Such evidence could not be based upon the price between a willing buyer and a willing seller. In the very nature of the operation, companies have a monopoly within their own field, and further the value of the land in the market would depend upon the price which the regulated company may be permitted to charge to its customers. A market price could not be fixed where the value would be dependent upon the rate which could be charged when that rate is within the control of a regulatory body and should depend upon the value of the land. To say that the value of the land is to be determined by the rate at which the gas may be sold, and that the rate for which the gas may be sold depends upon the value of the land is reasoning in a circle, and such testimony can be of but little value." (R., 153.)

The Supreme Court of Ohio affirmed the action of the commission in rejecting the testimony of the witnesses for the company and held that no market value was established. * * *

In order to portray the price per acre which the company was paying for acreage that it was classifying as No. 1 in 1927, 1928 and 1929, Blundon, for the city, made a compilation from the records of the company, as dis-

closed in Company Exhibits 146, 147 and 148 and City Exhibits 71, 72 and 73, which he presented as pages 24 and 25 of City Exhibit 115. (R., 3187, 3188, 3189.) The considerations shown on these pages are conclusive proof of the average price that was paid farm owners during the three years immediately prior to the date certain of this appraisal. The average price actually paid was from 62 cents per acre to $2.05 per acre. (R., 1418-1420.) These costs were a part of the average included in the summary of total cost of Class No. 1 acreage. Pages 2 and 3, City Ex. No. 86. (R., 3165.)

The transactions analyzed are convincing as to the company's ability to obtain gas acreage in production areas at a very moderate cost. A similar situation was brought to the attention of the federal court when it thus expressed itself:

> "The record discloses no evidence that even in the proved and producing territory, leases which expire cannot be renewed upon identically the same terms, or that new leases may not be obtained upon such terms in territory as it is proved and comes into production. The conditions of rental seem to be standardized and the terms to be considered mutually fair, the return to the lessor adequate. Under such circumstances the best, if not the only, evidence of value in the record is the investment value."
>
> *United Fuel Gas Company, et al. v. Railroad Commission of Kentucky, et al.*, 13 Fed. (2nd), 510, supra.

The book value carried on Ohio Fuel's record, including the unoperated as well as the operated acreage and also deliberate write-ups made after some special ap-

praisement, is set forth on page 1, City Exhibit No. 89, original. For all leaseholds, minus the deliberate write-ups of 1918 and 1919 amounting to $3,748,036.00, the total book value is found to be $4,730,244.00. The value of the operated or used and useful acreage is obviously less than that amount.

* * * * * * * * * * * * * *

The Supreme Court of Ohio, in reviewing the evidence and the ruling of the commission in the present case, said:

> "The next question which arises is as to the fair valuation of the leaseholds owned by the Ohio Fuel Gas Company and used in the conduct of its business. This court has held in a previous valuation case that the method of using cost to determine value of leaseholds did not give due regard to the value of the property used and useful. No valuation can be based upon market price because of the fact that there is no market for a gas property so extensive as that of The Ohio Fuel Gas Company.
>
> In the case of Logan Gas Co. v. Public Utilities Commission, 121 Ohio St., 507, 169 N. E., 575, Classes 2, 3 and 4 leaseholds (non-producing) were excluded from the valuation upon the ground that the property was not used and useful, and that decision was sustained by this court. In the case of Logan Gas Co. v. Public Utilities Commission, 124 Ohio St., 248, 177 N. E., 587, this court in a per curiam opinion sustained the commission in basing its valuation of Class No. 1 leaseholds (producing) under Section 499-9, General Code, upon book value and not upon market value. Because the valuation found in the Logan Gas Company case was $25.00 per acre, both the majority and the minority of the commission in this case fixed a valuation upon Class No. 1 leaseholds (producing) of $25.00 per acre, it

being conceded in each finding that this valuation is approximately $2,500,000 more than the present book value of all leaseholds of The Ohio Fuel Gas Company and the Logan Gas Company combined, eliminating, as stated in the minority opinion, the 'arbitrary write up' of approximately $3,700,000 in the Logan Gas Company's leaseholds made during 1919. In valuing these leases at more than the book value under this record, the commission was in error. The commission was also in error in including in its valuation the book value of all leaseholds. Only the present book value of Class No. 1 leaseholds (producing) may be allowed."

Columbus Gas & Fuel Co. v. Public Utilities Commission of Ohio, 127 O. S., 109, 187 N. E., 7, P. U. R., 1933D, 238. (R., 62.)

The language of Mr. Justice Stone in the United case, supra, is here applicable.

"On the record as made, appellants have failed to present any convincing evidence of value of their gas field which would enable us to assign to it any greater value than that which they appear to have assigned to it on their books. This book value, therefore, may be accepted not as evidence of the real value of the gas field, but as an assumed value named by the appellants, which, on the evidence presented cannot reasonably be fixed at any higher figure."

United Fuel Gas Company, et al. v. Railroad Commission, 278 U. S., 300, at page 318.

Finally the Ohio court concluded with the following statement:

"It was held in United Fuel Gas Co. v. Kentucky R. Commission (1925), 13 F. (2d), 510, that for rate base purposes, gas acreage belonging to a natural

gas company should be valued at its book value rather than on the basis of its earning capacity. The court adverts to the fallacy of the argument that because of the earning capacity and large return allowed the property has greatly increased in value, and that such increased value should thereupon be taken as the basis of another calculation of a still larger return. The holding of that case was affirmed by the United States Supreme Court in the case of United Fuel Gas Co. v. Kentucky R. Commission, 278 U. S., 300, 73 L. Ed., 390, P. U. R., 1929A, 433, 49 S. Ct., 150.

This same fallacy has been pointed out by Mr. Justice Hughes in the Minnesota Rate Cases (1913), 230 U. S., 352, 57 L. Ed., 1511, 33 S. Ct., 729, 48 L. R. A. (N. S.), 1151, Ann. Cas., 1916A, 18, and by Mr. Justice Brandeis in his concurring opinion in Missouri, ex rel. Southwestern Bell Teleph. Co. v. Public Service Commission, 262 U. S., 276, 67 L. Ed., 981, P. U. R., 1923C, 193, 43 S. Ct., 544, 31 A. L. R., 807.

The court in United Fuel Gas Co. v. Kentucky R. Commission, supra, felt itself constrained in the absence of market value and under the rule just stated that earning capacity should not be taken into consideration for establishment of the rate basis, to hold that the best, if not the only evidence of value in the record, was the book value.

In view of this holding of the United States District Court, and the specific holding of this court, in Logan Gas Co. v. Public Utilities Commission, 124 Ohio St., 248, 177 N. E., 587, we hold that the value of Class No. 1 leases should be reduced to book value, and reduced to the book value of Class No. 1 leases alone."

Columbus Gas & Fuel Co. v. Public Utilities Commission of Ohio, 127 O. S., 109, 187 N. E., 7, P. U. R., 1933D, 238, supra. (R., 63.)"

No proof was offered by the appellant company as to the value of the leaseholds of Ohio Fuel which in any way assisted the commission or gave it any right to complain concerning the action of the commission or the court. The city of Columbus in its brief (brief of appellee, the city of Columbus, in the Columbus Gas case, supra, pages 168 to 178, inclusive), under the heading "Gasoline extraction and oil production of the Preston Oil Company in conjunction with Ohio Fuel," points out some very interesting facts relative to such leaseholds and the purported cost of gas production to Ohio Fuel. This discussion will not be repeated here, but the court is requested to consider it in connection with this case. It is quite instructive.

6. Amortization and Depreciation Charge—The Ohio Fuel Gas Company.

Appellant protests the treatment of Ohio Fuel in the matter of amortization. (Appellant's Brief, Sub-heading 10, at page 109.)

The city of Columbus in its brief (brief of appellee, the city of Columbus, in the Columbus Gas case, supra, pages 189 to 204, inclusive), discusses this subject in the following manner:

Amortization.

"No claim was made for amortization by the Columbus company for its own properties. Its only contention in this matter is presented for Ohio Fuel and United.

This annual amortization allowance must not be confused with the annual depreciation allowance which was included by the commission and approved by the court; it is demanded as a separate and distinct allowance.

Amortization as requested in this case may be defined as the payment over a period of years by consumers to a corporation of an amount equal to the present purported reproduction and/or market value of all its properties, both tangible and intangible, in addition to the payment of all operating expenses, including repairs and replacements of property, the building up of a depreciation reserve and the rendering of an annual return.

Demands of this nature from public utility companies must be closely scrutinized; they are often made for the express purpose of rendering commission regulation impotent. Through these preposterous additions to operating expense some companies seek to obtain unjust and unfair rates while calmly maintaining that governmental agencies can do nothing but place upon them the stamp of approval.

There is little place for amortization in utility regulation because it has been found to readily lend itself to all kinds of abuses. It should never be allowed except where property can be given a definite life beyond which it will serve no useful purpose. Confiscation can be claimed only if the end of the business and the destruction of the company's investment are predictable by reliable testimony. Where this cannot be done a gas business has no more right to lay claim to amortization

allowance as a matter of constitutional guarantee than the telephone business or the electric light business. Unless the termination of a business can be predicted with reasonable certainty there is no constitutional support for an assault upon a statute denying the right to amortization in that business. The vice of permitting amortization of property that has indefinite life and usefulness and of basing an annual charge upon fancied and inflated values is fully apparent in this case.

The Claims for Ohio Fuel.

In order to acquaint the court with the extent of the demands of the company we must refer to a few of the items included to which amortization would apply:

Engineering and superintendence	$3,049,442.00
Law Expenditures, Insurance, Taxes	1,199,953.00
Organization	1,999,922.00
Interest	4,619,426.00
Cost of financing	3,199,876.00
Going concern value	12,000,000.00
Leaseholds	43,004,477.00
	$69,073,096.00

We point out these items specifically because standing alone they plainly demonstrate the indefensible character of the claims on this subject. But in addition the right is demanded to amortize all other properties at the company's claimed cost of reproduction amounting

to more than $70,000,000.00, which, of course, brings the purported total subject to amortization to the amount of $140,000,000.00. (R., 2912-2914.)

A general amortization was thus sought for all these inflated values over a period of 25 years. The amount per year which would be collected for the purpose was $5,449,221.00 and at the same time claim was made for an annual depreciation allowance of $1,420,241.00 or a total annual collection for amortization and depreciation of $6,869,462.00. (R., 161.) Now, upon what evidence does this contention rest? Upon the following from the cross examination of company witness Seyffert:

> "Q. * * * You say the present estimate of the probable life of the natural gas business based on extensive surveys, geological studies, well-pressure decline and analysis, etc., indicates a probable period of 25 years? A. Yes, sir. * * *" (R., 1480.)
>
> "Commissioner Bricker: What else would you set up amortization on except leaseholds?
>
> The Witness: Set up amortization on the whole property, because when the gas is gone, the rest of the property will be of no value to the stockholders." Company Brief, pp. 44 and 45. (R., 1489.)

It may pertinently be remarked that this is a very flimsy pretext upon which to ask consumers to pay an annual amortization of $5,449,221.00. Nevertheless this constitutes the evidence upon which opposing counsel rely. There is nothing else. In fact, the testimony must be read in light of the cross examination of Seyffert in order to understand just how baseless it really is. His testimony, as is shown by the following excerpt from

the record, is of no probative value and was rightly disregarded:

"Q. Now you are going to write this whole investment off in 25 years? (No reply.)

Q. That is your purpose? A. 20 or 25 years; I do not know that we can make it absolutely definite.

Q. Why not 25 or 30? A. Well, in my judgment, that is too long.

Q. Well, you did select 25 and I ask, that is your best judgment? A. Well, I cannot say I just selected 25; I selected about that and used four per cent.

Q. Well, 25 into 100, of course, does give four per cent. You say the present estimate of the probable life of the natural gas business based on extensive surveys, geological studies, well-pressure decline and analysis, etc., indicates a probable period of 25 years? A. Yes, sir.

Q. How do you make up your mind about that? Refer us to the literature which has aided you in reaching that conclusion? A. I am not referring to literature; I am referring to my experience in the business, together with the contact and experience of other people and the generally known hazards of the business and the character of the business, all of which is taken into consideration in arriving at what is a reasonable term over which we feel that we must get a return of the capital or of the value in order not to suffer a loss.

Q. I think you told me rather fairly one day that in no sense did you consider yourself an engineer; you consider yourself an accountant and auditor? A. No, I consider myself more than an accountant and auditor. I have been with the company in this business a good many years.

Q. Oh, I know you have. A. And I know something of the character of the business.

Q. Well, have you made a study of the life of natural gas? A. Well, in my connection with the company, the question of the life of wells and the ques-

tion of the continuance of the business comes up frequently.

Q. But, Mr. Seyffert, a few years ago, five or six years ago, your company was saying that five or six years was the probable life; what has brought about the change?

Mr. Turner: Which company?

Mr. Butler: The Columbus Gas & Fuel Company.

The Witness: Well, I do not know anything about such a statement, to begin with.

Q. You think it was wrong, if it was made by anybody? A. Well, I cannot say because I do not know that it was made.

Q. Well, I will relieve you of that obligation; I will put it differently. Could that have been properly said in 1925, that the probable life of the gas business was five or six years, natural gas business? A. Well, I don't think it could, no.

Q. We don't think so either, but I am interested in knowing how you get at 25 years? A. Well, you know and I know that no one knows exactly when it will be; we have got to make an estimate of that, and as I say here the probable theory is 25 years; it depends upon many things; it depends upon whether you will find additional fields; it depends on how much is taken out each year; and all those things have to be weighed and some estimate has to be made of the probable life which we have done, and we have estimated that as 25 years, which is as long as I think we should for those purposes.

Q. Have you a discussion of that somewhere where you have gone into it, where you have from an accountant's or an engineering point of view reached that conclusion? A. No, sir.

Q. Well, you think that is the best answer you can give me? A. I do, yes, sir.

Q. All right. What does the company's balance sheet reveal as to the amount of the reserve for depreciation and amortization? A. I haven't those figures with me, Mr. Butler; I may have them.

Q. As of December 31, 1929? A. I may have it here. In Exhibit 43, page 5, the depreciation is $19,006,536.66; the amortization $1,739,029.89.

Q. Then you have a surplus of how much? A. We had a surplus December 31, 1929, of $5,288,031.10.

Q. Not that reserve—and I have it in my notes as $20,726,000.00— A. I think you have added the two together; I think that is about right.

Q. Oh, I see. Now that has gone into your property, hasn't it, that 20 million dollars plus; what have you done with that reserve? A. Yes, that has been reinvested in the property.

Q. Well, now, do you mean to say that you expect the commission to allow you to amortize that $20,000,000.00 at the end of 25 years? A. I expect the commission to allow us to amortize any amount of money that is put into the capital of our business.

Q. Well, in the next 25 years at the rate you calculated of about $1,420,000.00 a year, you would raise that to $35,000,000.00 or $40,000,000.00 more; would you expect that to be returned? A. Whatever money is put into plant absolutely we expect to be returned to us.

Q. You want this commission now to allow you to bring back the whole of this $140,000,000.00 at the end of 25 years although you already have a reserve in excess of $20,000,000.00 and although under your set-up you will in the next 25 years get an additional reserve of $35,000,000.00 or $40,000,000.00? A. That is rather a long question but I think I can answer it—

Q. All right. A. By saying that the value of the property as found here is $140,000,000.00; we certainly are entitled to have that returned to us during the life of the property; by application of four per cent. we will get it back in probably 25 years or thereabouts. Now if at the end of that time we get the $140,000,000.00 back, and reinvest it in property, we will certainly expect it back, because that money

belongs to the stockholders and it is reinvested in different property and during the life of that property we certainly would expect it back again; or any other money that is put into the plant; always we must get it back or we stand to suffer that loss."

* * * * * * * * * * * * *

"Q. What are you going to do with this $35,000,000.00 or $40,000,000.00 that you propose in the next 25 years to take for the purpose of depreciation—what you call depreciation and amortization as distinguished from your big amortization; what are you going to do with that; and whose money is that? A. It is the stockholders' money.

Q. The stockholders' money? A. Yes, that belongs to the stockholders. When the company earns some money at agreed rates or rates adjusted by the commission and creates an amount above operating expenses, that belongs to the stockholders. The reserve is set-up for the benefit of the stockholders so that he will get his money returned to him.

Q. But you are going to return it to him under your general amortization plan? A. I don't get your question.

Q. All right. By the way, how long has this company been in operation? Give me the historical set-up of this company in as few words as you can. A. Well, of course, it has been growing all the time; it has been growing all the time; it starts out in a small way and the earnings and the depreciation reserves have been reinvested in the plant until it has grown from—I think The Ohio Fuel Supply Company started in 1902; some of the other units may have been a little older. I think The Columbus Gas & Fuel Company was a little older than that; probably not as a natural gas company; but from that beginning they have grown up to what they are today." (R., 1480, 1481, 1482, 1483, 1484.)

Ohio Fuel and its predecessors have been in existence for approximately 30 years during which time they have continually bemoaned the impending exhaustion of the supply of natural gas while meters clicked steadily. But it remained for the Columbus company to come into this rate case at a time, when natural gas is admittedly known to be the most plentiful in its entire history, and ask the commission to consider amortization for Ohio Fuel of all properties at a claimed present value of $140,000,000.00 over the period of the next 25 years in order that it (the Columbus company) may charge to its operating expenses a high rate for purchased gas.

One wonders why during all those 30 years, when the "wolf" was supposed to be coming at any minute, some of this amortization which s now fancied necessary did not take place. The fact that these companies have already had a long life, during which time they have collected high rates and paid large dividends while amassing big reserve funds, appears of no importance to the company.

Again we quote from the cross examination of Seyffert:

> "Q. Well, now, by what process of reasoning do you take those combinations of properties and fix them at $140,000,000.00 and then amortize off the whole of it in the next 25 years? A. I have told you before that I did not fix the $140,000,000.00. However, that was fixed through a valuation which is expressed here. Now if we are to go forward with this plant and if we are right in our estimate of the life of 25 years, then we must amortize it at that rate in order to get the value of the plant back in that period of time.

Q. Well, shouldn't you have been amortizing back there; shouldn't somebody have been amortizing? A. Not necessarily, no, sir." (R., 1484, 1485.)

Such is the indefensible basis upon which the Columbus Company seeks to support an unfair charge by a sister corporation.

Indeed, the Harvard professor, brought to the witness stand as an outstanding expert by the Columbus Company, said that amortization is a matter of negligible importance and should not be considered in connection with the settlement of our rate. Here is his testimony:

"Q. What per cent would you think it safe to put aside for the time the gas would be depleted to pay you back your capital? A. I should refuse Your Honor to even guess at that, the wildest sort of guess. I should assume in the buying of a natural gas property today in our eastern field, I should assume that that was a possibility which did not have to be taken into account. The advanced technique, the possibility of the use of producer gas in connection with natural gas, and the ultimate substitution of producer gas for natural gas, if necessary, in the eastern territory—all these were factors which made such an assumption unnecessary.

Q. So if you would assume that somebody in this case had testified that it would be the part of good business to put aside a reserve of four per cent each year to get the capital back at the end of 25 years, you would not agree that that was necessary? A. No, sir, I would not agree." (R., 2599.)

Of course opposing counsel ignores this evidence and attacks the opinion of the Supreme Court of Ohio. But they cannot conceal the weakness of their contentions by such a ruse.

Under no theory is there any right to a general amortization of the properties of any of these companies. The Record in this case shows conclusively that there is no shortage of natural gas. That is a bogy with which consumers were once frightened into paying higher rates, but no longer. The city took great pains to destroy the old cry, "The wolf is coming". The exhibits and testimony clearly justify the view that the court should waste no time in considering the lack of supply or any cessation of the supply. Dewing, as we have shown under rate of return, said that great trunk lines are being tied up with each other in both eastern and western fields so that instead of drawing from particular fields we are now drawing from greater reservoirs of natural gas and that exhaustion of supply for any particular locality is growing less and less each year. He said that in a city like Columbus failure of supply is a factor that need not be noticed. (R., 2598, 2599.) Another witness for the company, Wheeler, said that a few years ago consumers were being urged to use less gas but are now being induced to use more gas because the reserves are known to be much larger than was then thought. (R., 2664.)

We have shown the vast extensions of pipe lines and the vast aggregations of capital that have gone into them. Great pipe lines have gone into the east, to Baltimore, Washington and Philadelphia, from West Virginia and Kentucky. Great pipe lines have been laid across the prairies to Chicago, and the Columbia System has put millions into a pipe line that taps the great reservoirs in the southwest. (R., 1478, 3104B, 3089, 3090.)

The evidence discloses nothing to prove that the experience of the Columbia System even suggested remote fears of failure of supply. This testimony is submitted:

> "Chairman Geiger: All right. Well, now, if the Columbia Gas & Electric Corporation, which is the parent company of these subsidiary companies, had any fear that there was to be a near failure of the gas supply in the various gas fields, why have they expended large sums of money, which they necessarily must do, to construct these distribution lines into these large cities?
>
> The Witness: I have not heard any one say that the Columbia fears that the supply would exhaust.
>
> Mr. Turner: Mr. Seyffert has correctly answered that there has been no such testimony and no statements made except Mr. Butler's questions.
>
> Chairman Geiger: You then would say that there is no imminence of failure of the gas supply at this time?
>
> The Witness: I know the management of the Columbia well enough to know that they are not spending money unless they can feel that they can get their money back and an earning from it. They are good enough business men to do that, and they certainly have looked into the question of the supply of gas before they would build a line of that type.
>
> Chairman Geiger: All right, then, that answers the question; there is no fear now in the minds of The Columbia Gas and Electric Corporation that there will be a near exhaustion of the present supply of gas?
>
> The Witness: None that I have ever heard expressed.
>
> Chairman Geiger: All right." (R., 1479.)

The record further shows that there are millions of acres of unfouched gas lands in Ohio and West Virginia.

We again invite attention to the testimony of wit-

nesses for the company discussed under Unoperated Leaseholds showing their estimate of gas reserves in Ohio.

There is no reason for assuming in the instant case, without proof, that the usefulness of the property now devoted to natural gas service by Ohio Fuel and United is even limited to the life of the natural gas supply. In fact the testimony of Dr. Dewing reveals what he calls "the possibility of the use of producer gas in connection with natural gas, and the ultimate substitution of producer gas for natural gas, if necessary in the eastern territory." (R., 2599.) This, it may be assumed, is due to the extensive deposits of coal located in eastern territory, including Ohio and West Virginia, from which artificial gas may be produced.

Commissioner Bricker, in the minority opinion, stated the situation as follows:

> "Ten years ago in Ohio a similar investigation as this would have brought promptly to issue the question of the supply of gas, the company contending then as did other companies that the supply was rapidly running out and that there must be consideration given to the amortization of property and unobserved depreciation allowances, based upon a maximum gas supply of ten years. The company's witnesses in this case state that for all practical purposes the supply of natural gas available for this market is unlimited.
>
> The commission therefore can approah this problem without giving consideration to the life of the property other than as to those factors resulting from normal depreciation and obsolescence." (R., 192.)

The majority opinion thus tersely stated their conclusions:

> "However, gas seems now to be such an assured product that for the purposes of the present consideration it may be regarded almost as reliable as a water supply." (R., 170.)

The commission and court were fully justified in assuming an unpredictable life for the usefulness of these properties.

On this subject the Supreme Court of Ohio said:

> "There is no provision for amortization under the laws of Ohio. Where the life of a utility's product is uncertain, can it be intelligently and fairly amortized? We think not.
>
> The contention that there should be an allowance by way of amortization sufficient to return the entire investment of the company to the stockholders during the period of the life of the business is untenable as the business has no fixed life.
>
> As bearing on the question of the certainty of the life of the business, the gas company places much stress on the testimony of practical gas men, to the effect that they could not predict a longer life than twenty-five years for the company. Practical experience teaches us that this is a mere prophecy. The gas business will continue so long as natural gas can be taken from the earth in the fields controlled by the parent corporation, in paying quantities. History along this line reveals the fact that the testimony of experts as to the probable life of natural gas is unreliable, and it is for this reason that amortization is guess-work. * * * That the product natural gas will eventually die is self-evident. When it will die is an assumption. An assumption is no stronger than the facts that support it, and it is just as fair to assume that much of the equipment

now used in the transportation and distribution of natural gas will be utilized for the transportation and distribution of artificial gas in the future."

The Columbus Gas and Fuel Company v. Public Utilities Commission of Ohio, supra. (R., 66, 67.)

While it is true that amortization has never received legislative recognition in Ohio, if what is claimed as amortization constitutes some form of depreciation it may be included in the operating expenses under the Ohio statutes as construed by the decision of the court in this case. The court said:

"Unless amortization can be converted into some sort of depreciation there is no authority in law for such a charge in this state.

It may be insisted that unless a reasonable amount is allowed annually for amortization a fair rate basis cannot be attained. That may be true, but the legislature has prescribed a valuation formula. If this formula is unfair to the utility, unless and until it reaches the point of confiscation, the remedy is with the legislature and not with the courts." (R., 69.)

It is perhaps unnecessary for us to state that the construction placed on the statutes of the state by its highest court is accepted by this court.

Thornton v. Duffy, 254 U. S., 361, 368, 65 L. Ed., 304, 41 Sup. Ct., 137;

Douglas v. Noble, 261 U. S., 165, 168, 67 L. Ed., 590, 43 Sup. Ct., 303;

Fallbrook Irrigation District v. Bradley, 164 U. S., 112, 154, 41 L. Ed., 369, 17 Sup. Ct., 56.

But even if the Ohio statutes sanctioned amortization where the life of the gas business could be established with certainty, the evidence in this case would not sustain it and the allowance claimed could not be adopted.

Since the evidence in the case at bar establishes a life expectancy for the business of Ohio Fuel extending into the indefinite future, there is no basis in fact for any claim for amortization. The demand for amortization of all properties was thus properly refused by the commission and the court."

Furthermore in the consideration of this case it must be remembered that an allowance for amortization was made by appellee in the sum of $4,158,954 and even on the basis of including such an allowance appellant failed to establish the increase in rates sought.

7. Delay Rentals on Unoperated Leaseholds—The Ohio Fuel Gas Company.

Under sub-heading 11 at page 117 of its brief (Appellant's Brief, page 117) appellant complains of no allowance for the annual rentals paid by Ohio Fuel on its unoperated leaseholds.

In its treatment of this subject, the city of Columbus (Brief of Appellee, the City of Columbus, in the Columbus Gas case, supra, pages 147 and 148) says:

Since the unoperated acreage cannot be included legally in the valution, it follows that the expense of carrying it, known as "delay rentals," cannot be charged as an operating expense against existing gas consumers.

The commission and court were, therefore, right in eliminating these charges from consideration.

The commission said:

> "The commission is of the opinion that inasmuch as the Supreme Court has held that the nonproductive acreage may not be considered in fixing the rate base, it must logically follow that the expense of carrying that nonproductive acreage may not be considered as a part of the maintenance of the system which has at its command other acreage which is actually producing gas and is therefore used and useful. The commission is in harmony in disallowing as an expense of the company delayed rentals, but is of the view that when this nonproductive acreage is brought into production that the cost incurred in carrying it through its nonproductive period may then well go into its valuation, and be capitalized." (R., 155, 156.)

Commissioner Bricker thus summed up the subject:

> "If this rule were not followed it would be possible for a company, less scrupulous than this one, to pay delayed rentals beyond requirements in order to increase the expenses and upon that basis fix a high rate to the consumer which would have to be approved by a regulatory body and then after the rate had once been established, release the reserve leaseholds, as the company can do under its contracts and cut down the expenses of the company, thereby establishing a rate which would be unjust, unfair and excessive to the public." (R., 197.)

The findings of the commissioners as to delay rentals on unused and unuseful acreage in Ohio were approved by the Supreme Court. *The Columbus Gas and Fuel Company v. Public Utilities Commission of Ohio*, 127 O. S., 109, 187 N. E., 7. (R., 58.)

8. A Contract to Purchase Gas Made Between Affiliated Gas Companies is Not Conclusive as to the Reasonableness or Fairness of the Contract Price and in Determining a Just Gate Price For Gas a Public Utilities Commission May Require Evidence as to the Cost of the Gas So Produced and Sold.

Under Sub-heading 12, (Appellant's Brief, p. 119), appellant contends that the court below erred in disregarding the contract between the Ohio Company and the United Company under which the Ohio Company purchases from the United Company gas produced in West Virginia and Kentucky and in fixing as a price which the Ohio Company could include in its operating expenses for said gas an amount less than that fixed by the contract, on the theory that this action was an interference with and a burden upon interstate commerce in violation of Article 1, Section 8, Clause 3 of the Constitution of the United States.

Appellant seems to lose sight of the fact that the only authority claimed by the appellee in this case was to make an investigation in order to determine whether affiliated companies were claiming undue profits at the expense of one another and what constituted a fair charge to the towns here involved for the cost of purchased gas.

It will be remembered by the court that the gas sold to the consumers of the towns involved in this case was transported to the city gates by the Ohio Fuel Gas Com-

pany; that the Ohio Fuel Gas Company secures a portion of the gas so transported from the United Fuel Gas Company; that this gas purchased from the United Fuel Gas Company is mixed with the gas of the Ohio Fuel Gas Company and the mixed gas is then transported to the city gates and sold to the distributing company, the appellant. It might be further noted that the United gas is not interstate gas when it reaches the towns in question for the reason that it is mingled with other Ohio Fuel gas at the Ohio river and no attempt was ever made to separate it. The business of the Ohio Fuel Gas Company is local not national in aspect and north of Wheeler's Station at least there can be no question but what United Gas has lost its interstate nature. But even if the United Gas had not lost its interstate nature the right of appellee to inquire as to the reasonableness of contract prices in order to determine a just gate price has been well established by this court in its recent decision in *Western Distributing Company v. Public Service Commission of the State of Kansas, et al.*, 285 U. S., 119, 76 L. ed., 655, wherein this court held, paragraph 1 of the syllabus, that:

> "'A local natural gas distributing company making application to a state public utilities commission for an increase of rates is bound to show that the price paid by it for gas obtained from a pipe line company is fair and reasonable, although the interstate character of the pipe line company precludes state regulation of its rates, where both companies are subsidiaries of the third company.''

A more applicable decision to the facts present in this case would be hard to conceive. In this case the appellant is a local natural gas distributing company. It made application to a state Public Utilities Commission for an increase in rates and that commission (the appellee) required it to show that the price paid by it for gas obtained from a pipe line company was fair and reasonable. The appellant and the pipe line companies are subsidiaries of the Columbia Gas & Electric Corporation.

It has heretofore been indicated that the gas in question when it reaches the city gates is no longer interstate in character but even if it were that would be of no consequence under the decision of this court in the foregoing case.

To sustain its contention appellant cites the recent decision of this court in *State Corporation Commission v. Wichita Gas Company*, 290 U. S., ..., 78 L. Ed., 362. However, if counsel for appellant had read this case carefully it would have observed that the decision in no wise changes the finding in *Western Distributing Company v. Public Service Commission of Kansas*, supra, but is in accord therewith and has no application to the question before the court in this case.

We quote in part paragraph 1 of the syllabus of the Wichita case:

> "* * * And that in ascertaining the reasonableness of the rate charged by a public utility, no charge for service rendered by a holding or affiliated company or charge for material or commodity purchased from a holding or affiliated company shall be given consideration unless a showing is made of the actual cost to the holding or affiliated company furnishing such service and material or commodity."

III.

RATE OF RETURN.

Upon the basis of the valuation and operating expenses as allowed by appellee, the appellant's rate of return was found by appellee to have been slightly in excess of 6½%. (R., 223.)

Appellant contends that the evidence on rate of return shows that it was entitled to not less than 8%. (Appellant's Brief, p. 120.) This evidence apparently consists of the testimony of Witness Hamilton (R., 566), who testified that, in his judgment, an 8% rate of return was necessary. Presumably if Mr. Hamilton had testified that 10% 15% or even 25% was a necessary rate of return appellant would insist that the evidence established the necessity of allowing such amounts.

Appellant next contends that the question before appellee was the reasonableness of appellant's rates at the effective date of the schedules under consideration (July 17, 1929) which appellant says has generally been regarded as the very peak of prosperous times in this country. (Appellant's Brief, p. 121.) Certainly appellant does not contend that a rate fixed as of a date certain—in this case July 17, 1929—is to ignore the operation of that rate in the immediate future. The increased rates in question have been collected from July 17, 1929, down to the present time and it will be recognized that within six months after the institution of said increased rates

this country entered one of the worst depressions in its history a fact of which this court has taken judicial notice. *(Atcheson, Topeka and Sante Fe Railway Co. v. U. S.,* 284 U. S., 248.) At the time of the hearing in this matter before the appellee (1930-1932) it was a well recognized fact that the country was suffering from a very severe depression and that prices in general were at a very low level but, according to appellant's argument, appellee should have ignored the actual experience of appellant under its increased rates and the actual conditions of the country during that time.

As a matter of fact, appellee contends that it is its duty to consider the fair rate of return not only as of a date certain but in the light of current conditions in the immediate future for, as was said by this court in *Smith v. Illinois Bell Telephone Company,* 282 U. S., 133, 75 L. ed., 255, 51 S. Ct., 65:

> "A rate order which is confiscatory when made may cease to be confiscatory, or one which is valid when made may become confiscatory at a later period."

The further fact that each of these companies is a part of the Columbia system is also worthy of consideration in determining the rate of return for, as was held in *Chesapeake & Potomac Telephone Company v. Whitman,* 3 Fed. (2d), 938, 953, the ownership by a holding company which increases the ease of securing new capital reduces the rate of return. A similar statement is

found in *Smith v. Illinois Bell Telephone Company, supra,* wherein this court said:

> "It is evident that in the present case we are not dealing with an ordinary public utility company, but with one that is part of a large system organized for the purpose of maintaining the credit of the constituent companies and securing their efficient and economic management."

To support its contentions for a larger rate of return appellant cites but two decisions of this court, *Bluefield Water Works and Improvement Company v. Public Service Commission,* 262 U. S., 679, and *United Railways v. West,* 280 U. S., 234. Neither of these cases, however, sustains the contention of appellant that it is entitled to an 8% return. In dealing with this topic appellant again appears to be uninformed as to the more recent decisions of this court for it neglects to mention *Wabash Valley Electric Company v. Young,* 287 U. S., 488, 77 L. ed., 447, 53 St. Ct., 234, or *Los Angeles Gas & Electric Corporation v. Railroad Commission of California, et al.,* 289 U. S., 287, 77 L. ed., 1180, 53 S. Ct., 637.

In the Wabash case, supra, this court at paragraph 9 of the syllabus held that:

> "A rate of return of 7 per cent. for a public utility company supplying electricity will not be deemed so inadequate as to amount to a taking of property without due process because after taking care of debts and dividends there may be nothing left for surplus, where it appears that the company has a surplus equal to nearly 28 per cent. of its total stock and funded debt liability, and the fact that it is a subsidiary of a company by which its stock and se-

curities are owned, and which also owns and finances other similar companies, makes it reasonable to conclude that it is in a more favorable financial situation than if it were a disconnected enterprise."

In this connection it seems only fair to say that the appellant occupies a very excellent position financially in the utility field.

In *Los Angeles Gas & Electric Corp. v. Railroad Commission of California, et al.*, 289 U. S., 287, 77 L. ed., 1180, 53 St. Ct., 637, this court held at page 319 as follows:

"The commission calculated that the company would have a return of 7 per cent. on this rate base.

* * *

"Applying these principles, and considering the financial history of the company, its relations and opportunities, and the general situation as to investments, we find it impossible to hold that a return of 7 per cent. is so low as to be confiscatory. Wabash Valley Electric Co. v. Young, supra, (287 U. S., 502, ante, 447, 53 S. Ct., 234)."

In the very recently decided case of *Illinois Bell Telephone Company v. Gilbert, et al.* (City of Chicago, Intervener) before the three-judge Statutory Court for the Northern District of Illinois, Eastern Division, decided April 29, 1933, and reported in 3 Federal Supplement, 595, it was held in paragraph 11 of the syllabus, at page 596, as follows:

"Under record, fair rate of return on average fair value of telephone company's intrastate property, so as to avoid confiscation, in prescribing rates for telephone service in Chicago, held 7½ per cent. for 1923-1927, 7 per cent. for 1928-1930, 6½ per cent. for 1931, and 5½ per cent. for 1932."

At page 605 of the opinion in this case the court said:

> "We have given weight to the facts of which the court takes judicial notice relative to the general decline in corporate earnings during the years 1931 and 1932. It is for this reason that we have fixed 6½ per cent. as the proper rate of return for 1931 and 5½ per cent. as the proper rate of return for 1932. A public utility enjoying the advantages of plaintiff is not entitled to the large earnings made by many undertakings during periods of great prosperity. On the other hand, its return in times of business adversity should not be reduced to the extent that the earnings of many private corporations have been impaired. The range of from 7½ per cent. to 5½ per cent. as found in this case gives weight, in our opinion, to all of the elements which under the ruling of the Supreme Court we are required to consider."

The discussion by appellant (Appellant's Brief, 125-127, inclusive) relating to the hazardous nature of the gas business as a further basis for allowing an 8% rate of return is not worthy of very serious consideration. *The Los Angeles Gas & Electric Company v. Railroad Commission of California, supra,* was a gas case. Furthermore, the record in this case establishes fairly convincingly that there is no present or practical danger of the exhaustion of the supply of natural gas. This theory has long since been exploded though it has been used successfully by many gas utilities for many years. It should be further borne in mind that the appellant is not entirely a gas company. A very considerable portion of its business is concerned with the furnishing of electric light and power (R., 566) so that the argument for increased

return based upon the alleged hazards of the gas business does not seem to be well founded.

It should be apparent that a rate of return of 6½% from 1929 down to the present time will aggregate more than the return allowed by the statutory court *(Illinois Bell Telephone Co. v. Gilbert, et al., supra)* in the foregoing case during the same period.

IV.

ORDER OF REFUND.

If the decision of the appellee which was affirmed by the court below wherein the appellee rejected the application of appellant for an increase in its gas rates in the communities involved, was correct, then, of course, the order of refund was proper for as it has been pointed out heretofore, appellant has been collecting under bond since July 17, 1929, the increased rates found by the appellee and the lower court to be excessive. This collection under bond being in accordance with the provisions of the Pence Law of the then existing Section 614-20 of the Ohio General Code (110 O. L., 366) (Appendix) which law provided for the refund of any increased rates collected thereunder if such increased rates should be found subsequently to be excessive.

Appellant's "Summary Statement" at Page 133.

On page 133 of its brief (Appellant's Brief, p. 133) appellant has set up what it labels as "Summary statement showing result of correction of only a few of the errors complained of." This table is based upon such hypothetical assumptions and conclusions as to defy analysis. In the first place, it assumes that the valuation claimed by it, totalling $1,250,221.00, is correct. It next assumes that it is entitled to an 8 per cent. return on that valuation. From there it proceeds to other assumptions no less violent and on the basis of these assumptions and conclusions decides that it has been deprived of a fair return on its property. It apparently overlooks the fact that the questions before this court for review are as to whether or not the valuation of its property by appellee was correct and, further, whether the operating expenses as allowed by the appellee were less than those to which the appellant was entitled and finally whether as a result its property has been confiscated by the decision of appellee and the court below and then assuming that the answers to all these questions are in its favor it proceeds to construct a table showing the alleged net results thereof.

V.

THE CONTENTION OF APPELLANT THAT THE COURT DID NOT EXERCISE ITS INDEPENDENT JUDGMENT.

Under this heading, appellant sets up two claims. Its first claim is found on page 135 (Appellant's Brief, p. 135), and is as follows:

> "(1) The court below failed and refused to exercise its own independent judgment on questions of fact as well as law. Its judgment therefore results in violation of the Fourteenth Amendment."

That this contention on the part of the appellant is in the nature of an after-thought, is established by the fact that it was not included in appellant's original assignment of errors (R., 4-15, inclusive) but was included in a motion filed for leave to amend its assignment of errors. (R., 16.) The decision of the Supreme Court of Ohio, in both the Columbus case and this case *(The Columbus Gas & Fuel Company v. The Public Utilities Commission of Ohio; The City of Columbus v. P. U. C. O.,* 127 O. S., 109) *(The Dayton Power and Light Company v. The Public Utilities Commission of Ohio,* 127 O. S., 137) shows the careful consideration that was given by the court to the case and the contention of the plaintiff in this connection is so obviously without merit that it does not warrant further consideration.

Its second claim is found on page 136 (Appellant's Brief, p. 136) and is as follows:

> "(2) The evidence in this case being uncontradicted and coming from witnesses whose competency and credibility were not questioned, is conclusive of the facts testified to."

It has previously been pointed out in this brief, time after time, that much of this evidence of appellant's witnesses, particularly relating to the proper gate rate price for gas, was contradicted. It has further been pointed out in this brief, that testimony of witnesses which is purely speculative and conjectural under the decisions of this court, is not controlling. *Wabash Valley Electric Company v. Young*, 287 U. S. 488, 77 L. Ed., 447; P. U. R., 1933, A-433; 53 S. Ct., 234, and *Los Angeles Gas & Electric Company v. Railroad Commission of California*, 289 U. S., 287; 77 L. Ed., 1180; 53 S. Ct., 637.

VI.

THE CONTENTION THAT THE COURT ERRED IN OVERRULING APPLICATION FOR REHEARING.

This contention on the part of the appellant (Appellant's Brief, p. 137), is without merit.

CONCLUSION.

The judgment of the court below should be affirmed.

Respectfully submitted,

JOHN W. BRICKER,
Attorney General of Ohio,
DONALD C. POWER,
Assistant Attorney General of Ohio,
Counsel for Appellee, The Public Utilities Commission of Ohio.

Columbus, Ohio, March 7, 1934.

APPENDIX.

Applicable Statutory Provisions.

Section 499-8. The commission, for the purpose of ascertaining the reasonableness and justice of rates and charges for the service rendered by public utilities or railroads of this state, or for any other purpose authorized by law, may investigate and ascertain the value of the property of any public utility or railroad in this state, used or useful for the service and convenience of the public. * * * The commission shall have such power to make all rules and regulations, as to it may seem necessary, to ascertain the value of each and every utility or railroad in the state.

Section 499-9. The commission shall prescribe the details of the inventory of the property of each public utility or railroad in the state; and such inventory shall include all the kinds and classes of property, with the value of each, owned by each public utility or railroad, used and useful for the service and convenience of the public. In ascertaining the value of the various kinds and classes of property of each public utility or railroad, the commission shall have authority to ascertain and report in such detail as it may deem necessary as to each piece of property owned or used by such public utility or railroad to show separately the following facts:

A. The original cost, if any, of each parcel of land owned and used by such public utility or railroad, and a

statement of the conditions of acquisition; whether by direct purchase, by donation, by exercise of the power of eminent domain or otherwise.

B. The value as of a date certain, of each parcel of land owned and used by such public utility or railroad, by comparison with the value of contiguous and neighboring parcels of land, and land of similar character as to location and use.

* * * * * * * * * * * * * * *

D. The cost of new production as of a date certain, of all physical property other than land, owned and used by such public utility or railroad, showing the values of the separate items comprising such property, together with the unit basis of such valuation.

E. Depreciation, if any, from the new reproductive cost as of a date certain, for existing mechanical deterioration, for age, for obsolescence, for lack of utility or for any other cause, the percentage and amount of each class of depreciation, if any, to be specifically set forth in detail.

F. The net value as of a date certain, of all physical property other than land owned by such utility or railroad, to be derived by deducting the sum of the amounts of depreciation from the sum of the new reproductive costs.

G. If there shall be any additional value given to the value of the property of a public utility or railroad due to the possession of a franchise to perform a public service, or for good will or for financing, such additional value shall be separately and specifically set forth, to-

gether with the basis for the computation or estimate of such additional value.

* * * * * * * * * * * * * *

Such investigations and report shall show separately the property used and useful to such utility or railroad in the furnishing of the service to the public, and the property held by such utility or railroad for other purposes, and such other items concerning values and methods of making valuations as the commission may deem proper; which said inventories and reports shall be filed in the office of the commission for the information of the governor and the General Assembly.

Section 499-13. * * * Whenever the authority is conferred or the obligation imposed by law upon the commission to ascertain the value of any public utility or railroad, such valuation under such authority or obligation shall be made in accordance with the provisions of this act.

Section 499-16. The commission shall make and file its findings of fact in writing upon all matters concerning which evidence shall have been introduced before it which in its judgment have bearing on the value of the property of the public utility or railroad affected. Such findings shall be subject to review by the Supreme Court of this state in the same manner and within the same time as other orders and decisions of the commission.

Section 544. A final order made by the commission shall be reversed, vacated or modified by the Supreme Court on a petition in error, if, upon such consideration of the record such court is of the opinion that such order was unlawful and unreasonable.

Section 546. Upon service or waiver of the summons in error the commission shall forthwith transmit to the clerk of the Supreme Court a transcript of the journal entries, original papers or transcripts thereof and a certified transcript of all evidence adduced upon the hearing before the commission in the proceeding complained of, which shall be filed in said court.

Section 606. For the purpose of maintaining the department of public utilities commission of Ohio, including the payment of salaries, traveling expenses, printing, rent, light, heat, water, telephone and all other overhead expenses, and the exercise of police supervision of railroads and public utilities of the state by it, a sum not exceeding two hundred thousand dollars each year shall be apportioned among and assessed upon the railroads and public utilities within the state, by the commission, in proportion to the intrastate gross earnings or receipts of such railroads and public utilities for the year next preceding that in which the assessments are made. * * *.

Section 614-2. The following words and phrases used in this chapter unless the same is inconsistent with the text, shall be construed as follows:

The term "commission" when used in this act, or in Chapter One, Division Two, Title Three, Part First of the General Code and the acts amendatory or supplementary thereto means "the Public Utilities Commission of Ohio."

The term "commissioner" means one of the members of such commission.

Any person or persons, firm or firms, co-partnership or voluntary association, joint stock association, company or corporation, wherever organized or incorporated:

* * * * * * * * * * * * * * *

When engaged in the business of supplying natural gas for lighting, heating or power purposes to consumers within this state, is a natural gas company;

When engaged in the business of transporting natural gas or oil through pipes or tubing, either wholly or partly within this state, is a pipe line company;

* * * * * * * * * * * * * * *

Section 614-2a. The term "public utility" as used in this act, shall mean and include every corporation, company, co-partnership, person or association, their lessees, trustees or receivers, defined in the next preceding section, except such public utilities as operate their utilities not for profit, and except such public utilities as are, or may hereafter be owned or operated by any municipality, and except such utilities as are defined as "railroads" in G. C. 501 and 502, and these terms shall apply in defining "public utilities" and "railroads" wherever used in Chapter One, Division Two, Title Three, Part First of the General Code and the acts amendatory or supplementary thereto or in this act.

Section 614-3. The Public Utilities Commission of Ohio is hereby vested with the power and jurisdiction to supervise and regulate "public utilities" and "railroads" as herein defined and provided and to require all public utilities to furnish their products and render all

services exacted by the commission, or by law, and also to promulgate and enforce all orders relating to the protection, welfare and safety of railroad employees and the traveling public.

Section 614-20.

(110 Ohio Laws, 366—Pence Law—Repealed as of June 18, 1929.)

Section 614-20 (Pence Law, 110 Ohio Law, 366). Unless otherwise ordered by the commission, no change shall be made in any rate, joint rate, toll, classification, charge or rental in force at the time this act takes effect, or as shown upon the schedules which shall have been filed by a public utility in compliance with the requirements of this act, or by order of the commission, except after 30 days' notice in writing to the commission, which notice shall plainly state the changes proposed to be made in the schedule then in force, and the time when the change, rate, charge, toll, classification, or rental shall go into effect; and all proposed changes shall be plainly indicated upon existing schedules, or by filing new schedules thirty days prior to the time when they are to take effect, but the commission may prescribe a less time when they may take effect, provided, however, that if the proposed change shall effect an increase in the rate, joint rate, toll, classification, charge or rental, notice, in form approved by the commission, published once each week for three consecutive weeks before the effective

date thereof, unless the commission shall authorize a less time, shall be given by publication in a newspaper published at the county seat of each county in which such change applies, and of general circulation therein, or in one newspaper published in, and of general circulation throughout the territory in which such utility operates. Such published notice shall set forth the fact that such application has been made, the effective date of the proposed new schedule, the name and location of the agent of the utility in such county or territory where a copy of such proposed new schedule may be inspected by any interested party; and provided, further, however, that such utility shall at the time of the filing of the schedule with the commission, place on file with such agent of such utility a copy of the proposed new schedule and keep the same on file for the inspection of any interested party pending the hearing before such commission.

Whenever there shall be filed with the commission any schedule affecting an increase in any rate, joint rate, toll, classification, charge or rental, or stating any new regulation or practice affecting any existing rate, joint rate, toll, classification, charge or rental in force at the time this act takes effect, the commission shall have, and it is hereby given authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other form of pleading by the interested public utility, but upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, joint rate, toll, classification, charge, rental, regula-

tion or practice; and pending such hearing and the decision thereon, the commission upon filing with such schedule and delivering to the public utility affected thereby, a statement in writing of its reasons for such suspension, shall suspend the operation of such schedule and postpone the use and operation of such rate, joint rate, toll, classification, charge, rental, regulation or practice; but not for a longer period than one hundred and twenty days from the time when such schedule was filed with the commission; and after a full hearing, whether completed before or after the rate, joint rate, toll, classification, charge, rental, regulation or practice goes into effect, the commission may make such order in reference to such rate, joint rate, toll, classification, charge, rental, regulation or practice as would be proper in a proceeding initiated after the rate, joint rate, toll, classification, charge, rental, regulation or practice had become effective; provided, that if any such hearing cannot be concluded within the period of suspension, as above stated, such rate, joint rate, toll, classification, charge, rental, regulation or practice shall go into effect at the end of such period of suspension upon the public utility filing with the commission a bond, undertaking or other security, to the satisfaction of the commission, securing and guaranteeing the repayment, with interest at the rate of six per centum per annum from the date of payment by the consumer to the date of repayment by the utility, to all the consumers of such portion of such increased rate, joint rate, toll, classification, charge or rental, collected by such utility as the commission, upon final hearing, may determine to

have been unreasonable or excessive, which repayments shall be made at such times and in such amounts as the commission shall order, and shall be promptly paid by said utility to the corporations or persons entitled thereto, and in such manner as the commission may prescribe, and if any such money ordered by the commission to be repaid shall not have been claimed by the corporations or persons entitled thereto, within one year from the time the same shall become due and payable in accordance with the order of the commission, all such moneys shall be paid by the utility to the treasurer of the county, or other political subdivision, in which such new schedule is effective for the benefits of its general fund, in such amounts and in such manner as the commission may order; and thereafter such public utility shall not be liable therefor. Such bond, undertaking or security shall be in such amount as the commission may from time to time determine; provided, however, that the amount fixed at any time shall not, in addition to the amount of such increase or other charge made by the utility already accrued, exceed the estimated amount of such increase or other charge made by the utility extending over a period of one year, based upon the business of the utility for the previous year, or be less than one-half of such estimated amount.

All rates, joint rates, tolls, classifications, charges or rentals, of a public utility heretofore or hereafter fixed and determined by any order of the commission under the provisions of this chapter shall be in force and be prima facie lawful for two years from their effective date

or until changed or modified as provided by law, provided, however, that after any such rate, joint rate, toll, classification, charge or rental shall have been in force for a period of two years, the same may be changed by the public utility affected in the manner provided in this section; and that nothing herein contained shall be construed as in any way affecting the right of any person or public utility to make application, as provided in Sections 614-21 and 614-23 of the General Code or otherwise as provided by law, for an order rescinding, altering or amending any order of the commission within said two year period or thereafter.

At any hearing involving a rate increased or sought to be increased after this section shall have become effective, the burden of proof to show that the increased rate or the proposed increased rate is just and reasonable shall be upon the public utility and the commission shall give to the hearing and decision of such question, preference over other questions pending before it, and decide the same as speedily as possible.

Section 614-20.

(113 Ohio Laws, 17—Carpenter Act—Effective June 18, 1929.)

Section 614-20. Filing of application for change of rate; contents.

No rate, joint rate, toll, classification, charge or rental or any change in any rate, joint rate, toll, classification,

charge or rental or any regulation or practice affecting any rate, joint rate, toll, classification, charge or rental of a public utility shall become effective until the commission, by order, shall determine the same to be just and reasonable, except as hereinafter provided, providing however that this section shall not apply to any rate, joint rate, toll, classification, charge or rental or any regulation or practice affecting the same of railroads, street and electric railroads, motor transportation companies and pipe line companies. * * * If said application is for an increase in any rate, joint rate, toll, classification, charge or rental there shall also, unless otherwise ordered by the commission, be filed therewith in duplicate, the following exhibits:

A—A detailed inventory and appraisal of its property used and useful in rendering the service referred to in such application.

B—A complete operating statement of its last fiscal year, showing in detail all its receipts, revenues and incomes from all sources and all of its operating costs and all other expenditures; together with any analysis of so much thereof as it may deem applicable to the matter referred to in said application.

C—A statement of the income and expense anticipated under the application filed. * * * Provided, however, that in all actions or proceedings pending before the commission upon the effective date of this act, in which a rate, joint rate, toll, classification, charge or rental shall be in effect, or shall become effective, and

a bond, undertaking or other security shall have been filed, or may be filed by the utility, it shall be the duty of the commission to proceed to determine whether any portion of such rate, joint rate, toll, classification, charge or rental is unreasonable and excessive, and the utility shall repay to the consumers such portions of such rate, joint rate, toll, classification, charge, or rental collected as the commission, upon final hearing, shall determine to have been unreasonable and excessive, together with interest thereon at the rate of six per centum per annum from the date of payment by the consumers to the date of repayment by the utility. Such repayments shall be made at such times and in such amounts as the commission shall order * * * All rights to repayments of any portions of any rate, joint rate, toll, classification, charge or rental in effect or which may become effective in any action or proceeding pending upon the effective date of this act, and which the commission shall hereafter determine to have been unreasonable and excessive, are hereby preserved, and nothing in this act shall be deemed to invalidate any bond, undertaking or other security of a public utility filed with the commission in such pending action or proceeding, or the obligation of such public utility to make repayments, as may be ordered by the commission.

Section 5483. * * * In the month of October, annually, the auditor of state shall charge, for collection from each electric light, gas, natural gas, waterworks, telephone, messenger or signal, union depot, heating,

cooling and water transportation company, a sum in the nature of an excise tax, for the privilege of carrying on its intra-state business, to be computed on the amount so fixed and reported by the commission as the gross receipts of such company on its intra-state business for the year covered by its annual report to the commission, as required in this act, by taking one and thirty-five one-hundredths per cent. of all such gross receipts, which tax shall not be less than ten dollars in any case.

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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933.

No. 609

THE DAYTON POWER & LIGHT COMPANY,
Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO.

MEMORANDUM OF APPELLEE.

JOHN W. BRICKER,
Attorney General of Ohio;
DONALD C. POWER,
Assistant Attorney General of Ohio,
Counsel for Appellee, The Public Utilities Commission of Ohio.

March 15, 1934.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 609

THE DAYTON POWER & LIGHT COMPANY,
Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO.

MEMORANDUM OF APPELLEE.

During the oral argument of this cause, the Court requested that counsel file a brief memorandum setting forth certain information, with appropriate references to the Record, requested by the Court during the argument and which counsel was unable at the time to supply.

Counsel for appellee are accordingly filing this memorandum setting out the information requested by the Court as we understand it.

Summary Statement.

On June 17, 1929, the appellant filed with The Public Utilities Commission of Ohio a schedule of rates for the supply of gas in the several small Ohio municipalities involved in this case. This schedule which the company presumably considered to be entirely adequate to meet all its operating expenses and to provide a full and fair return

on its property averaged 67.6¢ per M. C. F., according to the company's own calculations (R. 581).

However, in attempting to sustain the burden of proving the reasonableness of its proposed rate, the company sought to show among other items of expense and value the following:

1. An 8% return on its claimed rate base of $1,250,221 (reduced by the Commission to a 6½% return). (Discussed in Appellee's Brief, p. 129 *et seq.*)

2. A return on $139,545 which consisted of the estimated cost of cutting and restoring paving over pipe lines which cost the Record discloses had never been incurred and was therefore eliminated by the Commission (R. 354, 361). (Discussed in Appellee's Brief, p. 34 *et seq.*)

3. A return on a separate going concern value of $125,000, a flat 10% of the claimed rate base. (This item was eliminated by the Commission.) (Discussed in Appellee's Brief, p. 38 *et seq.*)

4. A return on $39,600 consisting of the estimated costs of financing not in fact incurred and therefore eliminated by the Commission. (Discussed in Appellee's Brief, p. 29 *et seq.*)

5. A return on $130,640 consisting of overheads estimated at 17% of the depreciable physical property. (This item was found by the Commission to be 14% or $99,045.) (Discussed in Appellee's Brief, p. 47 *et seq.*)

6. A return on $83,200 consisting of an estimated allowance for working capital. (This was reduced by the Commission to $61,880.) (Discussed in Appellee's Brief, p. 50 *et seq.*)

7. A return on $24,774 consisting of the estimated organization or preconstruction costs not in fact in-

curred. (This item was entirely eliminated by the Commission.) (Discussed Appellee's Brief, p. 24 *et seq.*)

8. An annual depreciation allowance of $43,981. (This was reduced by the Commission to $13,721.) (Discussed in Appellee's Brief, p. 55 *et seq.*)

9. General administrative expense of $38,395. (This was reduced by the Commission to $32,432.) (Discussed in Appellee's Brief, p. 52.)

10. Gas purchase expense amounting to $536,611 at the rate of 45¢ per M. C. F. (This item was reduced by the Commission to $465,064 or 39¢ per M. C. F.) (Discussed in Appellee's Brief, pp. 57-109.)

All other items of valuation and expense submitted by the Company were accepted by the Commission without question but it did determine that the foregoing items were either excessive or should be wholly disallowed and that consequently the rate of 67.6¢ proposed by the Company was unreasonable and should be stricken from the files. The pertinent portion of the Commission's order thereon being as follows:

> "* * * And the Commission, coming now to consider the matters herein at issue, and having due regard for all of the testimony and exhibits offered and introduced in evidence at the hearing held herein, and having, this day, made and filed in writing, its findings of fact in this proceeding, and hereby readopting the finding and order made and entered herein November 21, 1930, the going into effect of which finding and order was suspended by the entry of January 9, 1931, hereby further finds:
>
> That the respondent has not sustained the burden imposed by the Statute and proven to be just and reasonable, the proposed increased rates set forth in the proposed schedules aforesaid.
>
> It is, therefore, ordered that the aforesaid proposed new schedule of The Dayton Power and Light Com-

pany be, and hereby the same, and each of them, are stricken from the files of this Commission and the said The Dayton Power and Light Company hereby notified, directed and required to cease and desist from collecting, imposing or charging, or attempting to collect, impose or charge the proposed rates set forth therein * * *."

This order was affirmed by the Supreme Court of Ohio, The Dayton Power and Light Company *v.* The Public Utilities Commission of Ohio, 127 Ohio State 137 (R. 82). Thereupon the Company, instead of filing a new schedule of rates lower than the promulgated schedule of 67.6¢ appealed to this Court. The failure of the Company to pursue the further remedy opened to it of seeking a new rate at the hands of the Commission, manifestly prohibits it from claiming confiscation before this Court as on any one of innumerable grounds the Commission was justified in cancelling the proposed rate of 67.6¢. For as a matter of fact the 61.9¢ rate collected by the Company under its former schedule of rates on the basis of all the evidence is not confiscatory.

The following table shows each of the items disallowed by the Commission in total dollars and a computation of the effect of such reductions in cents per M. C. F. of gas sold by the appellant in the territory here involved:

Valuation:	Claimed by Co.	Allowed by Comm.	Effect in cents per M. c. f. of gas sold
Organization Costs	$24,774	$00.00	.15
Cost of Financing	39,600	00.00	.23
Paving over Mains	139,545	00.00	.83
Going Concern Value	125,000	00.00	.74
General Overheads	130,640	99,045	.19
Working Capital	83,200	61,880	.13
			2.27*

* Calculated on a 6½% Return.

Return	8%	6½%	1.19*
Expenses:			
Annual Allowance for Depreciation	$43,981	$13,721	2.76
Administrative Expense	38,395	32,432	.54
Gas Purchased	536,611	465,064	6.51
			9.81
Grand Total of Differences			13.27

* Calculated on rate base found by Commission.

The Company attempted to justify the gate price for gas purchased from the Ohio Fuel Gas Co. by asserting an 8% return on a rate base which included the items listed below and which were properly disallowed by the Commission and by also asserting an exhorbitant claim for amortization which was substantially allowed by the Commission:

	Claimed by Co.	Allowed by Commission	Difference in M. C. F.
Gas Purchased:			
Operated Leaseholds	21,358,057	7,284,900	1.70
Gas wells	19,185,802	10,014,126	1.09
Return on 74,538,280	8%	6½%	2.09
Amortization	5,449,221	4,158,954	2.43
Disallowed by Commission			7.31

The Ohio Statute.

The Appellant suggests that the Ohio Statute (Section 614-20 of General Code 110 Ohio Laws 366) required the Commission to fix a new rate in the event it struck from the files the promulgated schedule of increased rates sought to be established by the Appellant. There are two patent

reasons why this newly alleged error cannot be raised in this Court:

1. The Company never requested the Commission to fix such a new rate, never assigned the Commission's failure so to do as an error in its appeal to the Supreme Court of Ohio, and the Supreme Court of Ohio never passed upon the question (Petition in Error to Supreme Court of Ohio, R. 38; Opinion and judgment of the Supreme Court of Ohio, R. 86), and this contention is not contained in the Assignment of Errors to this Court. (R. 4, Supreme Court of the United States, Assignment of Errors.)

2. Even had error been assigned and had the Supreme Court of Ohio decided that the Commission was not required to fix a new rate under the terms of the Ohio Statutes but that the Company must suggest a further schedule of rates, manifestly no federal question would be raised.

Furthermore, it is obvious that the Supreme Court of Ohio did not consider that the Commission had passed upon the reasonableness of the rates in effect at the time the new schedule was filed, for had it done so it would have reversed the Commission on the ground that such rates were unreasonable and unlawful under its decision in The Columbus Gas and Fuel Company case. For it should be remembered that the old rate in effect in the towns involved in this proceeding was 61.9¢ per M. C. F. (R. 581).

The Ohio Fuel Gas Co. Balance Sheets.

In accordance with the request of Mr. Justice Brandeis, may we suggest that the Balance Sheet of the Ohio Fuel Gas Company for the year ending December 31, 1929, is

found at pages 2901 and 2902 of Volume 4 of the Record in the case of Columbus Gas and Fuel Company *vs.* The Public Utilities Commission of Ohio, *et al.*, No. 608, in this Court, and that this Balance Sheet discloses as of December 31, 1929, surplus of $5,288,031.10 and reserves of $20,861,382.89 and that the Balance Sheet for this same Company for the year ending December 31, 1930, is found at pages 3033 and 3034 of Volume 4 of the Record in the Columbus Gas and Fuel Company case, *supra*, and that for the period ending December 31, 1930, surplus totalled $3,704,366.28 and reserves $21,056,627.18.

We have searched the Record in an attempt to furnish a citation to the Balance Sheet of The Dayton Power and Light Company, the Appellant herein, but we are unable to find this Balance Sheet any place in this Record.

Operated and Unoperated Leaseholds.

During the argument of this cause the question arose as to reserves for gas contained in the leasehold acreage valued by the Appellee as being actually used and useful (operated or Class 1 leaseholds). The statement was made by counsel for Appellee that the testimony of at least two of the witnesses for the Company had indicated that the gas reserves of the operated or Class 1 leaseholds was adequate for many years to come. To support that statement we should like to cite the Court to the testimony of Appellant Company Witness Dally (Columbus Gas and Fuel Company case, R. 1098), and Company Witness Wittmer (Columbus Gas and Fuel Company case, R. 1164), wherein these witnesses stated that there remained at the time of this valuation gas unproduced from operated or Class 1 leaseholds to the extent of 4,000,000 cu. ft. per acre. It was also stated by Witness Dally (R. 1136) that approximately 90% of the gas underlying the operated lease-

holds had not yet been taken from the ground. It is not disputed that the amount of acreage in the operated leaseholds consists of 291,396 acres (Columbus Gas and Fuel Company, R. 2911). Accordingly the gas reserves of this operated leasehold acreage in cu. ft. may be computed by multiplying 4,000,000 cu. ft. per acre by 291,386 for a total of 1,165,584,000 M. C. F. The Record further discloses that the annual sales of gas of the Ohio Fuel Gas Company at city gates totaled 53,943,794 M. C. F. (R. 2907, Columbus Gas and Fuel Company case). Divide 1;165,584,000 by 53,579,575, a result of 21.5 is obtained.

In other words upon the basis of the testimony of at least two of the Company's witnesses the operated leaseholds allowed by the Commission as used and useful property in the furnishing of gas contained a supply sufficient at the present rate of consumption to last 21.5 years from December 31, 1929, and this is all the more significant when it is considered that more than 50% of the gas sold by the Ohio Fuel Gas Company is purchased from the United Fuel Gas Company and independent producers. (R. 2905, 2906.) Therefore if the Ohio Fuel Gas Company continues to purchase gas from other producers in the same quantities the life of the operated leaseholds (Class 1) would be extended to 43 years. In the face of such testimony there can be little merit to the contention of the appellant that additional gas reserves other than that contained in operated leasehold acreage were necessary. Our discussion of this subject is found in Appellee's Brief, pages 75-90 inclusive.

Value of Leaseholds.

Some question was raised by the Court during the argument of this cause as to the precise method used by the Commission in evaluing the leaseholds of the Ohio Fuel Gas

Company. This matter is fully discussed by the Commission in its opinion in the Columbus Gas case (R. 149 *et seq.*) and this opinion became a part of the Record in this case by stipulation of the parties (R. 138).

We should like to further refer the Court to the testimony of Blundon (City of Columbus witness in Columbus Gas and Fuel Company case) wherein he stated that the average prices paid for Class 1 acreage by the Company in the years 1927, 1928 and 1929 for all acreage acquired by the company was $2.05 per acre. (R. Columbus Gas and Fuel Company case, page 1419; see also pages 24 and 25 of City Exhibit 115, R. Columbus Gas and Fuel Company case, pages 3187, 3188 and 3189.) Our discussion of this subject is found in Appellee's Brief at page 91-109 inclusive.

Conclusion.

Counsel for Appellee have not interpreted the Court's request for the filing of this memorandum as a request for the filing of a supplemental brief and we have therefore confined ourselves to answering those questions requested by the Court.

Respectfully submitted,

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Counsel for Appellee, The Public Utilities Commission of Ohio.

March 15, 1934.

SUPREME COURT OF THE UNITED STATES.

No. 609.—October Term, 1933.

The Dayton Power and Light Company, Appellant, *vs.* The Public Utilities Commission of Ohio, Appellee. } On Appeal from the Supreme Court of the State of Ohio.

[April 30, 1934.]

Mr. Justice Cardozo delivered the opinion of the Court.

The Dayton Power and Light Company, an Ohio corporation, is here as appellant challenging the validity of an order of the Public Utilities Commission of Ohio, affirmed by the Supreme Court of that state, which prescribes the rates chargeable to consumers of natural gas.

The appellant is a distributing company, producing no gas and owning no wells. The gas that it distributes it buys from the Ohio Fuel Gas Company, an affiliated corporation, delivery being made to it by the seller at the gateways of the towns and cities where its mains and service pipes are laid. Both seller and buyer are subsidiaries of the Columbia Gas and Electric Corporation, which owns the entire capital stock of each of them as well as that of other companies producing in other fields or distributing in other cities.

On June 17, 1929, the appellant filed with the Commission a new schedule of "rates and prices" to take effect thirty days later unless suspended or annulled. The average rate of increase was 5.67 cents per thousand cubic feet. Under the authority of statute (Pence Law, 110 Ohio Laws 366, General Code, sec. 614-20), the Commission suspended the operation of the new schedule for 120 days, and at the same time initiated an inquiry of its own motion as to the fairness of the increase. The proceedings being undetermined at the end of the period of suspension, the statute permitted the appellant to put the schedule into effect at once upon filing a bond securing the repayment to the consumers of such portion of the increased rate as the Commission, upon final hearing, might determine to have been unreasonable or excessive. Such a bond was given on October 9, 1929. The proceeding was then continued, but a decision was not announced till November 3, 1932. There had

been a pause in the hearings to await the final submission of the testimony in the case of the Columbus Gas and Fuel Company, an affiliated corporation serving other territory. Much of the testimony in that case was read into the record by stipulation as testimony in this. Upon the record thus supplemented the Commission announced its decision that the revenues under the earlier schedule were sufficient to yield a yearly net return of 6½ per cent upon the fair value of the property, that this return was reasonable, and that more must not be charged. An order was therefore made striking the new schedule from the files of the Commission, restraining the appellant from collecting the higher rates and directing as to the past that the difference between the old rates and the new ones, with six per cent interest, be refunded to consumers in accordance with the bond. Upon appeal to the Supreme Court of Ohio, the order was affirmed (127 Ohio St. 137) against the protest of the appellant that there had been an infringement of its privileges and immunities under the Constitution of the United States, Amendment XIV; Article I, sec. 10. Upon appeal to this court (Judicial Code, § 237 [a]; 28 U. S. C. § 344), the protest is renewed.

At the threshold there is a controversy as to the scope of the problem before us for solution. The appellee argues that the only question for the Commission was one as to the reasonableness of the new schedule in the very form proposed: let the rates be excessive by ever so little, the schedule, it is said, was to be rejected altogether, and no other could be substituted. In opposition the appellant urges that this is too narrow a construction of the function and powers of the Commission under the applicable statute: if the proposed schedule was too high and the earlier one too low, there was a duty to fix a rate between, and thereby make the compensation adequate. We accept this broader view in the absence of a ruling to the contrary by the courts of the state. It is borne out by the terms of the bond and by the requirements of the statute under which the bond was given: such part of the new collections as shall be found to be unreasonable, that and no more is to be refunded to the customers. It is borne out again by the findings and the order: the rate is to be returned to what it had been before the change, and the difference repaid. Finally it is borne out by the opinion of the state court, which considers upon the merits the objections enumerated by the appellant in its petition to review the order of the Commission, and finds them all to be untenable.

With the field of inquiry thus charted, we turn to the objections in the effort to determine whether separately or collectively they support the claim of confiscation.

They fall into three classes: (1) objections to the computation of operating expenses; (2) objections to the valuation of the property making up the rate base; and (3) objections to the rate itself.

First. Objections to the computation of operating expenses.

The chief item of controversy under this head is the price payable to the affiliated seller for gas delivered at the gates.

The contract between the appellant and the Ohio Fuel Gas Company called for payment at the rate of 45 cents per thousand cubic feet; the Commission found this price to be excessive to the extent of 6 cents, thereby reducing to 39 cents the allowance to be made as a proper operating expense.[1] There is no doubt under the decisions of this court that the Commission was not concluded by the price fixed in the agreement. This results from the relation of intimate alliance between the buyer and the seller. They were not dealing with each other at arm's length, and the prices that they fixed in their inter-company transactions were of no concern to the consumer unless kept within the bounds of reason. *Western Distributing Co.* v. *Public Service Commission of Kansas*, 285 U. S. 119; *Smith* v. *Illinois Bell Telephone Co.*, 282 U. S. 133; *United Fuel Gas Co.* v. *Railroad Commission of Kentucky*, 278 U. S. 300, 320. Whether the bounds were overpassed or heeded is next to be considered.

1. First in order of importance is the value of the gas fields.

The Ohio company, the seller, does not own its fields in fee. It does own leases covering nearly three million acres in Ohio and elsewhere. Some of these it uses as a source of supply to meet the present needs of customers. Others are held as a standby for the future. Are all to be included in determining the base on which a fair price is to be reckoned? Are some to be ruled out until the wells now in use are wholly depleted, or until depletion is near at hand? If some or all are to be included, what shall be the principle of appraisal: shall it be market value, or value as shown by the books, or some compromise between them?

[1] The appraisal of the appellant's property at the amount fixed by the Commission will allow a return of 6½% if operating expenses are lowered by this reduction of the gateway price. At the contract price of 45 cents the return will be less.

These and like questions have been much debated in the opinions below and in the arguments of counsel. They suggest interesting and important problems in the process of rate making for companies with wasting assets. When regard is had, however, to what has been done by the Commission and the state court as distinguished from what has been said, the case assumes another aspect. Much of the debate is then perceived to be irrelevant to the issue of confiscation *vel non*—confiscation, that is to say, of the property interests of the appellant—which in ultimate analysis is the only issue to be determined. To bring this out more clearly there is need to amplify the statement of the subject matter to be valued and the mode of valuation.

The leaseholds, operated and unoperated, are grouped into four classes. Class No. 1 (291,396 acres) is made up of "tracts of land having producing gas wells drilled thereon from which gas is being furnished to the public." Class No. 2 (164,739 acres, unoperated) is made up of "tracts of land proved by actual developments and operations in the immediate vicinity thereof to be good gas-producing lands, but which do not have any producing wells drilled thereon." Class No. 3 (312,631 acres, unoperated) is made up of "tracts of land shown by surrounding or neighboring developments of operations, geological considerations, etc., to be reasonably certain to be good gas land, at least as to large portions thereof, but not yet demonstrated to be such by actual drilling." Class No. 4 (2,065,421 acres, unoperated) is made up of "tracts of land situate within the areas of territory where gas sands are known or assumed to exist from general geological conditions, but which are so remote from actual gas-producing wells or territory that they are merely prospective gas lands."

The Commission has stated in its opinion that the leases in class No. 1 are the only ones that are presently "used and useful" in the public business of the owner, and hence the only ones to be valued in estimating a fair return.[2] The Commission has also stated in effect that there was no satisfactory evidence before it either of market or of intrinsic value for any portion of the acreage. This is what was said, but what was done was different. The

[2]Under the Ohio law a corporation selling its entire product to public utilities which in turn sell that product to consumers is itself a public utility if the shares are owned by the same persons. Ohio Mining Co. *v.* P. U. Comm., 106 Ohio St. 138, 146, 150.

value of the 291,396 acres in class No. 1 was $1,569,479 on the basis of their original cost with certain overheads and expenses added; the book value of the other classes, after deducting what is found to have been an arbitrary write up of about $3,700,000, was $3,160,765, a total for all classes of $4,730,244.[3] Instead of resorting to those tests the Commission made an allowance of $25 per acre for the 291,396 acres in class No. 1, selecting that figure because it had been approved by the Supreme Court of Ohio in another litigation affecting part of the same lands. *Logan Gas Co.* v. *Public Utilities Commission*, 124 Ohio St. 248. The result was an appraisal of $7,284,900, which was about $2,500,000 more than the book value of all the leases in classes 1 to 4 inclusive. On appeal this method of valuation did not pass without impeachment. The Supreme Court of Ohio said in its opinion (*Columbus Gas and Fuel Corporation* v. *Public Utilities Commission of Ohio*, 127 Ohio St. 109; *Dayton Power and Light Co.* v. *Public Utilities Commission of Ohio*, 127 Ohio St. 137) that the appraisal at the rate of $25 per acre was too high, and that the limit of the allowance should have been the book value of the leases in class No. 1. Once more there must be a distinction between what was said and what was done. Criticizing the appraisal of the Commission as over-liberal to the company, the court affirmed the order which had been made on the assumption that there should be an allowance of $7,284,900 because of the ownership of leases. The appellant may not prevail unless there has been error in the result as well as error in the reasoning. Is the appraisal of the leases at over seven million dollars an arbitrary act, which in turn has brought about an arbitrary rejection of the contract for gas delivered at the gates, and hence an infringement of constitutional immunities?

As to that issue the burden of proof rests heavily on the appellant. *Los Angeles Gas and Electric Corporation* v. *Railroad Commission of California*, 289 U. S. 287, 304, 305. In the endeavor to sustain it there has been an attempt to establish market and intrinsic values by the estimates of experts as well as by actual sales.

Webber, a witness for the appellant, placed the value of the leases in class No. 1 at $11,473,717; Meals at $17,483,760; Wittmer

[3]The Ohio Fuel Gas Company took over, in June, 1929, the leases of an affiliated company, the Logan Gas Company and its predecessor, the Logan Natural Gas and Fuel Company. These leases, after being carried on the Logan books at about $2,500,000, were marked up in 1919 so as to show an increase in value of $3,748,036.48.

at $21,825,000, and Dally at $26,225,640. For class No. 2 the estimates were: (Webber), $10,440,300; (Meals) $9,884,340; (Wittmer), $12,300,000; (Dally), $16,473,900. For class No. 3, (Webber), $10,504,320; (Meals) $1,250,524; (Wittmer), $3,120,000; (Dally), $6,252,620. For class No. 4, (Webber), $6,196,263; (Meals), $8,261,684; (Wittmer), $6,195,000; (Dally), $4,130,842. Variations so wide are sufficient of themselves to disprove the existence of a market in the strict or proper sense. *Sinclair Refining Co.* v. *Jenkins Petroleum Process Co.*, 289 U. S. 689, 697, 698, 699. If they have any probative effect, it is that of expressions of opinion by men familiar with the gas business and its opportunities for profit. But plainly opinions thus offered, even if entitled to some weight, have no such conclusive force that there is error of law in refusing to follow them. This is true of opinion evidence generally, whether addressed to a jury (*Head* v. *Hargrave*, 105 U. S. 45, 49) or to a judge (*The Conqueror*, 166 U. S. 110, 131, 133), or to a statutory board. *Uncasville Mfg. Co.* v. *Commissioner*, 55 F. (2d) 893, 897; *Tracy* v. *Commissioner*, 53 F. (2d) 575, 577; *Anchor Co., Inc.* v. *Commissioner*, 42 F. (2d) 99, 100; *Gloyd* v. *Commissioner*, 63 F. (2d) 649, 650. There are reasons why the principle has special application here. In the first place, the intrinsic value of the leases is dependent upon the capacity of the lands to yield productive wells, a capacity seldom to be judged with even a fair approach to certainty until tested by experience. *Natural Gas Co. of W. Va.* v. *Public Service Comm.*, 95 W. Va. 557, 569. In the second place, the profits to be earned in a regulated business must vary with the rates established by the supervising agencies of government, with the result that prophecies, however radiant, may be upset over night by the publication of a lower schedule. The witnesses for the appellant were alive to these possibilities of surprise and disappointment, and there are admissions that their chief interest was in an unregulated market. To these perturbing tendencies, all operating to weaken the persuasive force of their opinions, there must be added still another, that of interest or bias, conscious or unconscious. Webber, a broker, was a stockholder in the Columbia Gas and Electric Company, the parent corporation. For fifteen years he had been in the service of the Ohio Fuel Supply Co., the predecessor of the Ohio Fuel Gas Co. He had been a witness for the appellant in other litigations. Meals was the president of a gas company, had been engaged in the gas business for over forty years and had testified

in other suits. Wittmer was the owner of gas fields and sold his gas to the Ohio Fuel Gas Company and affiliated corporations. Dally was in the same position. The testimony of all is subject to the infirmities that were pointed out by this court in another rate controversy involving fields in West Virginia. *United Fuel Gas Co.* v. *Railroad Commission of Kentucky*, 278 U. S. 300, 316. It is not based, at least to a controlling extent, "on prevailing prices for gas leases or on actual sales." It is based upon "an estimated or assumed exhaustible supply of gas available to appellants until exhausted, and upon a predictable price for natural gas in unregulated markets" through a future period of years. Cf. *City of Charleston* v. *Public Service Commission*, 110 W. Va. 245. How uncertain are the data can be gathered from the variant results.

The appellant has attempted to correct these uncertainties by supplementing the opinions of its experts with testimony of actual sales. But they were sporadic transactions, separate in time and space, and at prices too disparate to supply a helpful test of value. Thus in 1929 Wittmer sold 101,600 acres of Ohio leaseholds to the Penn-Ohio Gas Co. for $1,085,000, and in the same year bought 7,000 acres for $100,000. About the same time Meals made a sale of 21,000 acres for $2,500,000. Dally had made purchases at prices ranging from $2 an acre for leaseholds of the quality of class No. 4 up to $50 or $75 an acre for leaseholds of a higher grade. Over against the evidence of these prices must be set the evidence that class No. 1 leases, acquired by the appellant in 1927, 1928 and 1929, had been bought at an average price of $2.05 an acre, and if three leases be excluded, at an average of 62¼ cents an acre. Then too, there are quantitative considerations that are not to be ignored. For the most part the prices stated by the appellant's witnesses had been paid for small tracts, if comparison be made with the vast and often unproved acres in controversy here. Nor is there any such uniformity of price as to suggest the existence of a standard. Meals sold 21,000 acres for more than Wittmer sold a tract almost five times as large. Indeed, the truth becomes obvious when one reads the testimony as a whole that the prices upon sales were playing a subordinate rôle, and that the ultimate appraisal was a forecast of productive power. Granting even that the testimony had an evidential value, it had that and nothing more. It had no such commanding quality as to apply coercion to the judgment of the appointed triers of the facts, and exclude every choice but one.

We do not attempt to determine upon this record whether the Commission and the state court were in error in expressing the opinion that only class No. 1 leases should have a place in the appraisal. On the one side it is argued (cf. *Wichita Gas Co.* v. *Public Service Commission,* 2 F. Supp. 792, 799) that the discretion of the owner as to the extent of the reserve essential for prudent management ought not to be overridden by a court unless proved by convincing testimony to have been fraudulent or arbitrary. On the other side it is argued (cf. *Wichita Gas Co.* v. *Public Service Commission, supra,* p. 816; *United Fuel Gas Co.* v. *Public Service Comm.,* 14 F. (2d) 209, 221) that the value of reserve leases acquired by the owner to supply the needs of a remote future are not a part of the rate base upon which profits are presently to be earned at the cost of the consuming public, though they may be brought into the base afterwards when the time to use them is at hand. Moreover, the very reason for including in operating expenses a depletion allowance that will amortize wasting assets is to make provision for a fund out of which capital may be replenished by the purchase of other leases if that use is thought to be preferable to dividing the fund among the shareholders and winding up the business. These and other arguments we put aside without expression of a choice, and this for the reason that the case as it has shaped itself does not require us to weigh them. Again we emphasize the distinction between dictum and decision. If that distinction is observed, the upshot of the case is seen to be that the Supreme Court of Ohio, with authority to revise the findings of the Commission in respect of fact and law (*Hocking Valley Railway Co.* v. *Public Utilities Commission,* 100 Ohio St. 321, 326, 327), has disapproved the appraisal of the No. 1 leaseholds at $25 an acre, has found the testimony insufficient to establish a value beyond that shown by the books, but has, none the less, upheld an order whereby rates have been fixed upon the basis of the book value of leases of every class (numbers 1 to 4 inclusive), and $2,500,000 besides. If the evidence would have been adequate to uphold a lower rate, *a fortiori* it was adequate to uphold the rate prescribed. Plainly in all this there has been no infringement of constitutional immunities unless a higher value has been made out by evidence too strong to be rejected. But for reasons already stated, the evidence is lacking in that high coercive power. Court and commission were free in their discretion to reject as unsatisfactory the conflicting opinions of a group of friendly experts.

They were free in their discretion to refuse to draw an inference of value from the prices stated to have been paid upon a few purchases and sales. If those data were unacceptable, the only others left were the entries in the books, and these perforce were followed for lack of anything better. The result is to reproduce the situation that was found and commented on in a suit by the United Fuel Gas Company, an affiliated corporation. *United Fuel Gas Co.* v. *Railroad Commission of Kentucky*, 278 U. S. 300, 318. "On the record as made, appellants have failed to present any convincing evidence of value of their gas field which would enable us to assign to it any greater value than that which they appear to have assigned to it on their books. This book value, therefore, may be accepted not as evidence of the real value of the gas field, but as an assumed value named by the appellants, which, on the evidence presented cannot reasonably be fixed at any higher figure." Cf. *United Fuel Gas Co.* v. *Public Service Commission of West Virginia*, 278 U. S. 322, 326.

2. Amortization and depletion.

In determining the price to be paid by the appellant for gas delivered at the gates, the Commission included among the operating expenses of the affiliated seller an annual allowance of $4,158,954 to amortize the value of leaseholds No. 1 (the only leaseholds then in use) and of the well-structures and equipment used in connection therewith, and thus provide a fund that would restore the depleted capital when the gas had been exhausted.

The Supreme Court of Ohio expressed the view in its opinion that this allowance was not permissible under the statutes of the state. None the less it affirmed the order of the Commission which fixed the rate of gas on the assumption that a charge for amortization was properly included in the operating expenses. In such circumstances the appellant is not aggrieved through the expression of a belief that the rate would have been lawful if the charge had been omitted.

The amount of the allowance is adequate and even liberal. It was made on the assumption (1) that the value of the gas fields in class No. 1 was $25 an acre, and (2) that the life expectancy of the contents of the wells and of the appurtenant structures and equipment was only three years and two months. Both assumptions are erroneous, though the error results to the appellant's benefit. As to assumption (1), the state court has held that there is no satisfactory evidence of the value of the leases in class No. 1 in excess of the

value assigned to them upon the books. A depletion allowance must therefore be excessive if it is made in the belief that a value of $25 per acre is the amount to be restored. As to assumption (2), there has been an underestimate of the life expectancy of the gas content of the wells, resulting once more in an exaggerated allowance for inroads upon capital. The prediction may have been correct in respect of the wells already driven and in use, though this is far from certain, but it was certainly too low if expectancy is to be measured by sources of supply in the 291,000 acres that had never been tapped and were available for the future.

The effect of these errors, and indeed of the first of them alone, without attempting to estimate the consequences of the second, is to make the amortization charge excessive to the extent of $761,098.50. In figuring the charge the present value of the leases was treated as 41.8874 per cent of $7,284,900, or $3,051,455; that of the gas well construction as $5,944,692, and that of the gas well equipment as $4,069,434, a total of $13,065,581. The actual present value of the leases in class No. 1 was not more than 41.8874 per cent of $1,569,479, or $657,414. The fund to be restored through amortization was thus overestimated to the extent of $2,394,041 or 18 3/10 per cent, which would reduce the annual charge, without change of the life expectancy, from $4,158,954 to $3,397,865.50.

We have assumed in what has been written that for the purpose of amortization the leases in class No. 1 are to be taken at the value shown on the books. The appellant will be little helped, however, if another standard is accepted. No method of valuation supported by the record will lay a basis for a holding that the allowance is inadequate to the point of confiscation. The truth seems to be, as was stated by a witness for the appellant, that the percentage of depletion appropriate for gas fields is "the wildest sort of guess." This results from many circumstances, not the least of which is the probability of improved methods of production. In an industry subject to these rapid changes the prophecies of one year are likely to be overturned by the experience of the next.

We think the allowance for depletion, instead of being too small, is so manifestly excessive as to supply a margin for the correction of other contested items that may approach the border line. *Los Angeles Gas and Electric Corporation* v. *Railroad Commission of California, supra,* p. 317.

3. Reserve for depreciation.

The Commission allowed as a charge against the operating expenses of the affiliated seller an annual reserve of $667,612 to be placed in a sinking fund and devoted to the maintenance of the plant with the exception of the wells and their equipment which had been separately cared for in the allowance for depletion.

The appellant has failed to show in any conclusive or convincing way that this reserve will be inadequate.

The Commission also allowed as a charge against the appellant's operating expenses an annual reserve in the amount of 2% of the "depreciable property" employed by the appellant in the business of distribution.

The percentage so fixed is stated to be in accord with the practice of the appellant as disclosed in its annual reports on file with the Commission.

The contention that the percentage of allowance should have been 4 per cent instead of 2 has no basis in the evidence.

4. Accrued Depreciation.

In determining the price to be paid for gas delivered at the gateways, the Commission appraised the wells and equipment of the affiliated seller as having suffered a depreciation of 58.1126 per cent. The appellant insists that the depreciation is excessive.

There is evidence that the method of computation adopted by the Commission is in accordance with the accepted practice of mining engineers. The practice is to ascertain the rock pressure at the initial flow of the gas and again at the time of the appraisal, and to measure the depreciation by the reduction thus disclosed. The wells and their equipment have only a scrap value after the exhaustion of the gas, and contents and containers thus depreciate together.

The appellant, though complaining that the percentage of depreciation is excessive, has had a benefit, more than equivalent to any injury, in the enhancement of the allowance for amortization and depletion.

5. The disallowance of the "delay rentals" for unoperated leases.

To keep alive the leases acquired as a reserve the affiliated seller paid the annual carrying charges (known as "delay rentals"), and there is objection to the exclusion of the payments from operating expenses.

We think it a sufficient answer that the annual amortization allowance of $4,158,954 has made provision for a fund whereby new

leases can be acquired and paid for out of current earnings. Operating expenses are magnified unduly if they cover both the fund and the payments that are made out of it.

6. The rate of 45 cents per thousand cubic feet viewed in the aspect of a customary charge.

An attempt is made to show that the price paid by the appellant to the affiliated seller was the current or market rate in contracts between producers and distributors in other towns and cities. To bolster up that argument a schedule of contracts was marked as an exhibit. Twenty-five contracts are listed. There is a concession that in all but two the seller is the Ohio Fuel Gas Company or an affiliated corporation. There is no evidence as to the relation between the seller and the buyers. For all that appears the buyers in most instances are parts of the same system. The prices are not uniform: many are higher than 45 cents, but some are lower, one of them being as low as 39 cents. Distances and other geographical conditions affecting the cost of transportation and delivery are undescribed and unexplained.

The Commission did not err in its determination that this was inconclusive evidence.

7. The general administrative expenses incurred by the appellant in the conduct of its business.

These, as claimed by the appellant, were $38,395; the Commission reduced them to $32,432.

A contract had been made with the Columbia Engineering and Management Corporation, an affiliated company, for services as manager in return for a percentage of the gross earnings. This item ($13,741) was found by the Commission to be excessive to the extent of $5,963, and the compensation was reduced accordingly. In view of the close relation between the affiliated companies, the burden was upon the appellant to sustain the fairness of the contract. We cannot hold that it did so in opposition to the judgment of a Commission acquainted with prices and other conditions in the localities affected.

We have now considered the objections to the allowance and disallowance of operating expenses.

To determine whether 39 cents per thousand cubic feet is a fair price to be paid for gas delivered at the gates, there has been need to consider the assets and expenses of the affiliated seller, for only thus has it been possible to estimate a fair return.

We have kept in mind the principle that "rates substantially higher than the line between validity and unconstitutionality properly may be deemed to be just and reasonable, and not excessive or extortionate." *Banton* v. *Belt Line Railway Corp.*, 268 U. S. 413, 423.

Even so, the burden of proof was on the buyer of the gas to show that in these transactions with the affiliated seller the price was no higher than would fairly be payable in a regulated business by a buyer unrelated to the seller and dealing at arm's length. *Western Distributing Co.* v. *Public Service Comm. of Kansas*, 285 U. S. 119, 124.

State court and Commission did not act in an arbitrary fashion when they held upon the evidence before them that the burden had not been borne.

There are certain other objections that have relation to the value of the appellant's property, and not to its expenses of operation or to the value of the property of the affiliated seller.

To these we now turn.

Second. The value of appellant's property.

(a) Objection is made that the going value of the appellant's business should have been included in the base.

The decisions of this court show what going value means (*Los Angeles Gas and Electric Corporation* v. *Railroad Commission of California, supra*, p. 313), distinguish it from good will, and hold that upon proof of its existence it may have a place in the base upon which rates are to be computed. The Commission was of opinion that there was here no constituent of property that called for separate appraisal apart from the recognition that had been given it as a contributory factor in other elements of value.

The appellant is a new company, engaged in business for a few years. The value of its physical assets is less than a million dollars. In the brief term of its existence it professes to have added to that value from $125,000 to $140,000 by combining the parts into an organism and causing them to work together. The Commission took the view that whatever increment of value had emerged from these sources was sufficiently reflected in the allowance of the cost of developing "new business" and in the appraisal of the physical assets as parts of an assembled whole. A like conclusion has been reached by this court in very similar conditions. *Los Angeles Gas and Electric Corporation* v. *Railroad Commission of California, supra*. p. 314. Going value is not something to be read

into every balance sheet as a perfunctory addition. "It calls for consideration of the history and circumstances of the particular enterprise." *Los Angeles Gas and Electric Corporation* v. *Railroad Commission of California, supra,* p. 314. Here the company was a small one and its organization simple. There was no diversified and complex business with ramifying subdivisions. We cannot in fairness say that after valuing the assets upon the basis of a plant in successful operation, there was left an element of going value to be added to the total. Even if the addition might have been made without departure from accepted principles, the omission to make it does not appear to have been so unreasonable or arbitrary as to overleap discretion and reach the zone of confiscation. "It is necessary again, in this relation, to distinguish between the legislative and judicial functions." *Los Angeles* case, *supra,* p. 314. Much that the framers of a schedule are at liberty to do, this court in the exercise of its supervisory jurisdiction may not require them to do. For the legislative process, at least equally with the judicial, there is an indeterminate penumbra within which choice is uncontrolled.

(b) A number of other objections may conveniently be grouped together.

The appellant complains of the refusal to make allowance for organization or pre-construction costs. There is no evidence that any were incurred, though this of itself is indecisive. *Ohio Utilities Co.* v. *Commission,* 267 U. S. 359, 362. It is conjectural whether they would be incurred in the hypothetical event of a reproduction of the business, and, if incurred, in what amount. The appellant's position as a member of an affiliated system would have a tendency to reduce such expenses to a minimum. We think the ruling is supported by decisions of this court. *Los Angeles Gas and Electric Corporation* v. *Railroad Commission of California, supra,* p. 310; *Wabash Valley Electric Co.* v. *Young,* 287 U. S. 488, 500. To this it is to be added that the item is of negligible importance. Its presence or absence would not make the difference between confiscation and a fair return. We do not figure to so fine a point in determining the application of the constitutional restraints of power.[4] An intelligent estimate of probable future

[4]The appellant's yearly revenues during the period of inquiry were $666 in excess of the amount of money needed to yield a return of 6½ per cent on the value fixed by the Commission. If pre-construction costs were to be added to the full extent claimed, the rate of return would be about .064.

values (*Southwestern Bell Telephone Co.* v. *Public Service Commission*, 262 U. S. 276, 288), and even indeed of present ones, is at best an approximation. The like is true of a forecast of the extent of future revenues. There is left in every case a reasonable margin of fluctuation and uncertainty.

The appellant complains also of the failure to include the hypothetical expense of financing the business as part of the cost of reproduction.

Considering the absence of evidence that any such expense had been incurred when the business was established and the uncertainty that it would be incurred if the plant were destroyed and reproduced, we think this item under recent decisions was properly rejected as remote and conjectural. *Wabash Valley Electric Co.* v. *Young, supra*, p. 500; *Los Angeles Gas and Electric Corporation* v. *Railroad Commission of California, supra*, p. 310. We are to remember that the cost of reproduction is a guide, but not a measure. *Los Angeles Gas and Electric Corporation* v. *Railroad Commission of California, supra*, p. 307.

What has been said of the foregoing items applies with little variation to the reduction of "general overheads", or undistributed expenses during the period of construction, from 17%, the amount claimed by the appellant, to 14%, the amount allowed by the Commission.

The cost in imaginary conditions of cutting and restoring pavements was not an increment of value. *Des Moines Gas and Electric Co.* v. *Des Moines*, 238 U. S. 153.

The amount necessary for working capital was carefully computed, and has not been proved to be too small for the requirements of the business.

Third. The rate of return on the investment.

The appellant contends that to avoid confiscation the rate of return should be 8 per cent, instead of 6½, which was allowed.

In view of business conditions, of which we take judicial notice (*Atchison, Topeka and Santa Fe R. Co.* v. *United States*, 284 U. S. 248, 260), the rate allowed was adequate. *Los Angeles Gas and Electric Corporation* v. *Railroad Commission of California, supra*, p. 319.

Whether a lower rate could be upheld is a question not before us.

Dissection of the several items that have been criticized in the appellant's argument has thus brought us to the conclusion that

the order of the Commission, whether generous or ungenerous, is at all events not confiscatory, and hence not subject to revision here. But the conclusion has reinforcements that come to it from other avenues of approach. In a statement put in evidence by the appellant, the rate of return under the new schedule is said to be 1 28/100 per cent of the fair value of the property. Under the earlier schedule the revenue was even less. So modest a rate suggests an inflation of the base on which the rate has been computed. It is a strain on credulity to argue that the appellant, when putting into effect a new schedule of charges, was satisfied with one productive of so meagre a return. The same surprise is excited when we consider what it claims as to the fair value of the gas delivered at the gates. All that the affiliated seller asks is 45 cents per thousand cubic feet, yet according to the appellant's figures nearly 7 cents more, or a price of about 52 cents, is necessary to protect the seller against the wrong of confiscation. The argument proves too much: the valuations are discredited by the teachings of experience. Men do not transact business without protest at confiscatory rates, at all events in the absence of extraordinary circumstances making submission to the loss expedient. If such circumstances exist, the appellant has not proved them. Nothing in the record lays the basis for a belief that the natural gas business in Ohio is unable to pay its way. That being so, what the public utility has done belies what it has said. We shall hardly go astray if we prefer the test of conduct.

Upon the submission of the cause the appellant made a motion to amend its assignments of error, which motion is now granted.

The decree of the Supreme Court of Ohio, affirming the order of the Public Utilities Commission, does not impair any privileges or immunities secured to the appellant by the Constitution of the United States, and must therefore be

Affirmed.

Mr. Justice VAN DEVANTER and Mr. Justice SUTHERLAND took no part in the consideration or decision of this case.

Mr. Justice MCREYNOLDS and Mr. Justice BUTLER concur in the result.